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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 361

E. W. CLARK, COMMISSIONER OF INSURANCE OF THE STATE OF IOWA, AS RECEIVER OF FEDERAL SURETY COMPANY, PETITIONER,

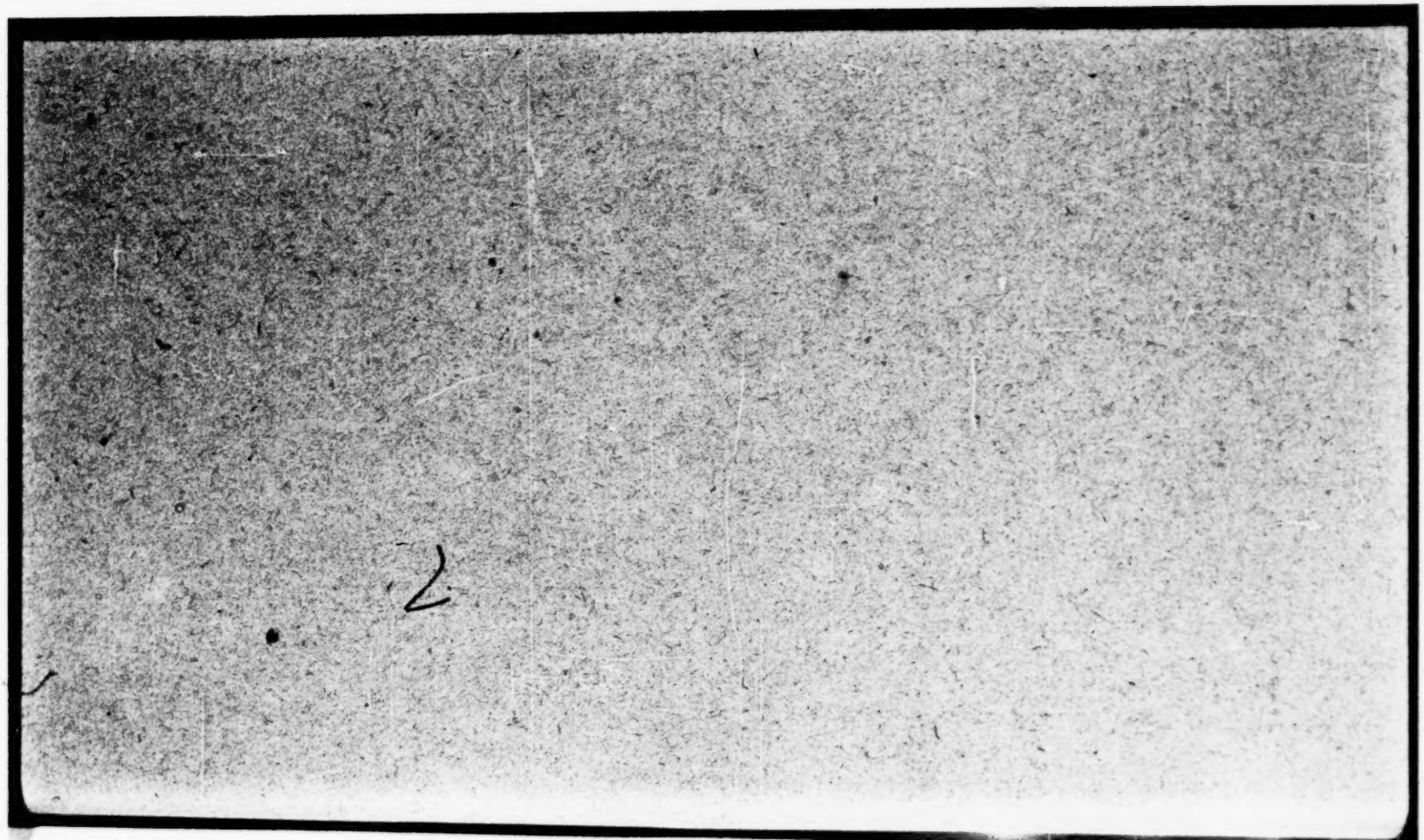
vs.

HARRY O. WILLIARD, W. W. WHEATON AND C. W. HAY, AS TRUSTEES OF GORDON CAMPBELL-KEVIN SYNDICATE, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA.

PETITION FOR CERTIORARI FILED SEPTEMBER 10, 1934.

CERTIORARI GRANTED OCTOBER 15, 1934.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No.

E. W. CLARK, COMMISSIONER OF INSURANCE OF THE STATE OF IOWA, AS RECEIVER OF FEDERAL SURETY COMPANY, PETITIONER,

vs.

HARRY O. WILLIARD, W. W. WHEATON AND C. W. HAY, AS TRUSTEES OF GORDON CAMPBELL-KEVIN SYNDICATE, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA.

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[fol. 91]

UNITED STATES OF AMERICA, SS:

(Seal of the Supreme Court of the United States)

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Montana, Greeting:

Whereas, lately in the Supreme Court of the State of Montana, before you, or some of you, in a cause entitled John Mieyr, Respondent, vs. Federal Surety Company of Davenport, Iowa, a Corporation, and E. W. Clark, as Receiver of Federal Surety Company of Davenport, Iowa, Respondents; Harry O. Williard, W. W. Wheaton, and C. W. Hay, as Trustees of Gordon Campbell-Kevin Syndicate, a Common law Trust, and Gordon Campbell-Kevin Syndicate, a Common-law Trust, Appellants, No. 7074, wherein the decree of the said Supreme Court, entered in said cause on the 1st day of April, A. D. 1933, is in the following words, viz:

"This cause came on for decision and judgment. For reasons stated in the opinion, the judgment and orders appealed from are reversed, and the cause remanded for further proceedings in accordance with the views expressed in the opinion. Opinion Per Curiam, concurred in by Mr. Chief Justice Callaway and Justices Matthews, Stewart and Anderson. Mr. Justice Angstman filed a dissenting opinion.

"There being no further matter presented the court went into recess."

[fol. 92] as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Supreme Court of The United States by virtue of a writ of certiorari granted upon the petition of E. W. Clark, as Receiver, whereon Harry O. Williard, W. W. Wheaton, and C. W. Hay, as Trustees of Gordon Campbell-Kevin Syndicate, et al., were made the parties respondent, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-three,

the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court, in this cause be, and the same is hereby, vacated, with costs, insofar as it adjudges the validity and priority of respondents' execution; and that the said E. W. Clark, as Receiver, recover against the said Harry O. Williard, W. W. Wheaton, and C. W. Hay, as Trustees of Gordon Campbell-Kevin Syndicate, et al., Two Hundred and Seventy Dollars and Seventy-five Cents for his costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court.

April 2, 1934.

[fol. 93] And the same is hereby remanded to you, the said Judges of the said Supreme Court of the State of Montana, in order that such execution and further proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of certiori notwithstanding.

Witness the Honorable Charles E. Hughes, Chief Justice of the United States, the thirtieth day of April, in the year of our Lord one thousand nine hundred thirty-four.

Costs of E. W. Clark, Receiver:

Clerk	$71.10
Printing Record	179.65
Attorney	20.00
	$270.75

Charles Elmore Cropley, Clerk of the Supreme Court of The United States.

[Endorsed:] Original. File No. 7074. Supreme Court of the United States No. 449. October Term, 1933. E. W. Clark, as Receiver, vs. Harry O. Williard, W. W. Wheaton, and C. W. Hay, as Trustees of Gordon Campbell-Kevin Syndicate, et al. Filed May 3, 1934. J. W. Crosby, Clerk of Supreme Court, State of Montana. Mandate.

[fol. 94] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

Costs of E. W. Clark, as Receiver in No. 449

1933, October Term—Docketing cause and filing record, $10.00; appearance, .25; filing precipe, .25, and receipt, .25; filing papers, $8.75; filing briefs, $5.00; submission, .20; order, .20; filing and recording, .65; certified copy of the order, $2.50; certificate of filing, $2.00; filing papers, ; filing briefs, $5.00; argument, .20; decree, $1.00; filing same, .25; recording, .40; mandate, $5.00; preparing record for printer, etc., $28.80; cost of printing record, $179.65; attorney's docket fee, $20.00; costs and copy, .40 ..... $270.75.

Fee Book, page 38052.

Teste:

Charles Elmore Cropley, Clerk of the Supreme Court of the United States. (F. W. Barr.)

[fol. 95] MINUTES OF THE SUPREME COURT, FIFTIETH DAY OF MARCH TERM, 1934

Monday, May 14, 1934.

Court convened pursuant to recess.

Present: The Hon. Lew. L. Callaway, Chief Justice; The Hon. Albert H. Angstman, Associate Justice; The Hon. John A. Matthews, Associate Justice; The Hon. S. V. Stewart, Associate Justice; The Hon. Ralph J. Anderson, Associate Justice; O. T. Crane, Acting Clerk; Floyd O. Small, Marshal.

And the following proceedings were had:

7074

JOHN MIEYR, Respondent,

v.

FEDERAL SURETY COMPANY, et al., Respondents; HARRY O. WILLIARD, et al., Appellants

It is ordered that this cause be set for argument on June 15, 1934, at ten o'clock a. m., at which time the Court

will hear argument from respective counsel touching the effect and direction of the Mandate of the Supreme Court of the United States, filed herein under the title of Clark, receiver.

There being no further matter presented the Court went into recess.

Lew. L. Callaway, Chief Justice.

Attest: O. T. Crane, Acting Clerk.

[fol. 96] MINUTES OF THE SUPREME COURT, EIGHTH DAY OF JUNE TERM, 1934

Friday, June 15, 1934.

Court convened pursuant to recess.

Present: The Hon. Lew. L. Callaway, Chief Justice; The Hon. Albert H. Angstman, Associate Justice; The Hon. John A. Matthews, Associate Justice; The Hon. S. V. Stewart, Associate Justice; The Hon. Ralph J. Anderson, Associate Justice; J. W. Crosby, Clerk; Floyd O. Small, Marshal.

And the following proceedings were had:

7074

JOHN MIEYR, Respondent,

v.

FEDERAL SURETY COMPANY, et al., Respondents; HARRY O. WILLIARD, et al., Appellants

This matter came on regularly for argument on the question as what manner of judgment should be rendered by this Court to conform to the opinion and Mandate of the Supreme Court of the United States in this cause. H. Leonard DeKalb, Esq., and Louis P. Donovan, Esq., appearing as counsel for the appellants and M. S. Gunn, Esq., appearing for the respondents. After argument by respective counsel the cause was submitted for decision.

There being no further matter presented the Court went into recess.

Lew. L. Callaway, Chief Justice.

Attest: J. W. Crosby, Clerk.

[fol. 97] State of Montana

IN THE SUPREME COURT, JUNE TERM, 1934

No. 7074

JOHN MIEYR, Plaintiff and Respondent,

v.

FEDERAL SURETY COMPANY OF DAVENPORT, IOWA, A Corporation, and E. W. Clark, as Receiver of Federal Surety Company of Davenport, Iowa, Defendants and Respondents; D. A. Crichton, Ancillary Receiver, Respondent; Harry O. Williard, W. W. Wheaton, and C. W. Hay, as Trustees of Gordon Campbell-Kevin Syndicate, a Common Law Trust, and Gordon Campbell-Kevin Syndicate, Appellants

Submitted June 15, 1934.
Decided July 24, 1934.
Filed July 24, 1934.

J. W. Crosby, Clerk.

[fol. 98] Mr. Justice ANDERSON delivered the Opinion of the Court:

This cause was heretofore before this court. (94 Mont. 508, 23 Pac. (2d) 959.) The decision there rendered was reviewed by the Supreme Court of the United States. (Clark v. Williard (U. S.), 78 L. Ed. 743.) The facts in detail are stated in our former opinion. The following brief summary of the facts, however, is sufficient for the solution of the question now before us:

Williard and others brought a suit in the district court of Fergus county against the Federal Surety Company. A trial was had, resulting in a judgment of nonsuit, which was reversed on appeal. (Williard v. Federal Surety Co., 91 Mont. 468, 8 Pac. (2d) 633. The courts of Iowa adjudged the dissolution of the Federal Surety Company and appointed Clark receiver for the company. Mieyr, a simple contract creditor, sought in the district court of Cascade county the appointment of an ancillary receiver of the assets of the surety company in Montana. The application was resisted by Clark. The case of Williard v. Federal

Surety Company was again tried and judgment rendered in favor of Williard et al. Leave was sought and granted by the district court of Cascade county to levy execution issued on the Fergus county judgment upon property belonging to the surety company within the state of Montana. Levy of execution was made. Clark, by separate petition setting forth the judgment of the Iowa court and the statutory law of that state applicable thereto, joined in the request of Mieyr to secure the appointment of an ancillary receiver for the assets of the surety company in Montana. A revocation of the leave granted to levy the execution was sought and granted. These various events, without reference to the dates, occurred in the order recited.

On the former appeal to this court it was decided that [fol. 99] Mieyr, being only a simple contract creditor, was not entitled to secure the appointment of a receiver, that the suit in Fergus county did not abate, and the judgment there rendered was a valid judgment. These conclusions were affirmed by the Supreme Court of the United States. We further decided on the former appeal that the status of Clark was that of a mere equity receiver, and accordingly the property of the surety company was subject to attachment and levy on execution under the laws of this state. The Supreme Court of the United States held that we misjudged the quality of the title of Clark; that, under the statutes of Iowa, Clark was the official liquidator—the successor to the corporation—and not a mere equity receiver, and that his title is the consequence of a succession established for the corporation by the law of its creation. In our former opinion holding the levy of the execution good as against the claim of Clark on the theory that he was not a statutory liquidator, but only an equity receiver, we expressed no opinion as to whether the same result would obtain if we recognized his status to be that as determined by the Supreme Court of the United States. The cause was remanded to us with the following directions: "The Supreme Court of Montana will determine whether there is any local policy whereby an insolvent foreign corporation in the hands of a liquidator with title must submit to the sacrifice of its assets or to their unequal distribution by writs of execution."

By this mandate we are commanded to determine, and thereby declare, the policy of the laws of this state. This

court, in the case of State v. Gateway Mortuaries, Inc., 87 Mont. 225, 287 Pac. 156, said: "What is the public policy of a state, and what is contrary to it, is not to be measured by the private convictions or notions of the persons who happen to be exercising judicial functions, but by reference to the enactments of the lawmaking power, and, in the absence of them, to the decisions of the courts. When, however, the legislature has spoken upon a particular subject and within [fol. 100] the limits of its constitutional powers, its utterance is the public policy of the state. (Mr. Chief Justice Brantly, in MacGinniss v. Boston & Mont. C. C. & S. M. Co., 29 Mont. 428, 75 Pac. 89, and Parchen v. Chessman, 49 Mont. 326, Ann. Cas. 1916A, 681, 143 Pac. 631, 148 Pac. 469.)"

Being mindful of the fact that we have under consideration the assets of a dissolved foreign corporation and the claim of a statutory liquidator to the assets, we must, in determining the public policy, first give consideration to the state of the law with reference to dissolved domestic corporations, lest we lead to discriminations within the prohibitions of the Fourteenth Amendment to the federal Constitution.

Section 6011, Revised Codes 1921, provides that "unless other persons are appointed by the court, the directors of any corporation, at the time of its dissolution by expiration of its charter or otherwise, are trustees of the creditors and stockholders or members of such corporation, and have full power to settle and liquidate its affairs, and such trustees, or a majority thereof, or in case of the death of one or more of such trustees, a majority of such survivors, are authorized to execute grants and conveyances of both real and personal property of such dissolved corporation. * * * ."

Section 9303, Id., relates to the appointment of receivers for dissolved corporations. Subdivision 6 of Section 9301 authorizes the appointment of receivers for dissolved or insolvent corporations, but only in actions pending. Under this section there cannot be such a thing as an action brought distinctly and solely for the appointment of a receiver. (State ex rel. First T. & S. Bank v. District Court, 50 Mont. 259, 146 Pac. 539.) Since the only purpose of this proceeding in the lower court was the appointment of a receiver, section 9301 is without application.

This court had before it for construction sections 6011 [fol. 101] and 9303 in the case of Ferrell v. Evans, 25 Mont. 444, 65 Pac. 714, wherein it was said: "Section 561 of the Civil Code [sec. 6011, Rev. Codes 1921] constitutes the directors of a corporation dissolved for any reason trustees for the creditors and shareholders, with full power to wind up its affairs, unless some other person be appointed for that purpose. No exception is made in case of insolvency. The intention of the legislature seems to have been to provide the most inexpensive and expeditious way for the administration of the affairs of a defunct corporation by confiding them in the hands of those who are best acquainted with them, and have a direct personal interest in preserving and appropriating the assets to their legitimate purposes, subject to an accounting or removal by a court of equity at the instance of a shareholder or creditor whose rights are jeopardized or betrayed. (Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192.) In no case, however, will a court resort to a removal of a statutory receiver, and appoint one in his stead, until it is made to appear that the person complaining has been, or is about to be, injured by an unwarranted procedure on his part. In this case, as we have seen, the associaiton was not insolvent."

The trustees of a dissolved corporation acting pursuant to section 6011, may be sued in the courts. (Gilna v. Barker, 78 Mont. 357, 254 Pac. 174.) The property of the dissolved corporation so being administered, is subject to attachment in the same manner and in the same cases where a writ of attachment would run against the property of the corporation itself. (Gilna v. Barker, 78 Mont. 343, 254 Pac. 169; see, also, Gilna v. Fidelity & Deposit Co., 83 Mont. 231, 272 Pac. 540.) Since the property of the dissolved corporation in the hands of the statutory trustees may be attached, preferences to creditors will logically follow. The question, therefore, arises, May the court, under the provisions of section 9303 appoint a receiver in [fol. 102] cases where the assets of a dissolved corporation are insufficient to pay the debts, and thereby secure a ratable distribution of its assets, and so prevent their unequal distribution?

It has been suggested that unless the provisions of section 9303 are held to so authorize the appointment of a

receiver, there is little excuse for the existence of the section. Numerous situations, however, may arise where the necessity of a receiver would be apparent and where the provisions of the section would afford the court authority for the appointment of a receiver aside from the suggested situation, as, where all the statutory trustees are dead, incompetent or beyond the jurisdiction of the court; or where the trustees refuse or absolutely fail to perform the duties imposed upon them by the statute; or upon any other ground which would justify a court in removing them from their office aside from preventing the unequal distribution of the assets among the creditors where the funds of the dissolved corporation are insufficient to pay the debts.

As this court pointed out in the case of Ferrell v. Evans, supra the directors of a dissolved corporation, for any cause, become the statutory trustees, and insolvent corporations are not excluded from the operation of the statute.

A debtor may pay one creditor in preference to another. (Sec. 8601, Rev. Codes 1921.) An insolvent corporation, in the absence of statutory prohibition, may prefer one creditor over another, the rule being the same with reference to corporations as it is to individuals. (Ames & Frost v. Heslet, 19 Mont. 188, 47 Pac. 805.) It was there contended that a different rule should prevail with reference to corporations from the prevailing rule applicable to individuals. In response to the argument the court said: "The policy of allowing such preferences may be pernicious, even more so that that of allowing an insolvent individual to [fol. 103] prefer creditors; but in the one case, as in the other, it is for the legislature to decide the question of policy, not the court."

The legislature in the enactment of section 6011 having included all dissolved corporations, and having failed to exempt from its provisions insolvent corporations, whatever the rule may have been or may now be elsewhere at common-law, the rule in this state is that there is no common law in any case where the law is declared by the Code or statute. (Sec. 10703, Rev. Codes 1921; Truro v. Passmore, 38 Mont. 544, 100 Pac. 966; Gillispie v. Great Northern Ry. Co., 63 Mont. 598, 208 Pac. 1059; State v. Newman, 66 Mont. 180, 213 Pac. 805.)

We therefore conclude that the courts of this state will not appoint a receiver to supplant the statutory trustees of

a dissolved insolvent corporation upon the sole and only ground of preventing the unequal distribution of its assets.

This court in the case of Rohr v. Stanton Trust & Savings Bank, 76 Mont. 248, 245 Pac. 947, applied the general principle of equity that the assets of an insolvent corporation are to be distributed ratably among general creditors in the distribution of assets of a bank, and held that a general creditor might not secure a preference over the other creditors. The principles therein announced, however, are declared by statutes then and now in existence and relating only to banking corporations. At the time of the rendition of the decision under discussion, the liquidation of insolvent banks are provided for in involuntary proceedings by section 6079, Revised Codes 1921; and Chapter 90 of the Laws of 1923 authorized the liquidation thereof by stockholders. Likewise in the same chapter, section 6109h provided that "no property owned by any bank organized under the laws of the state of Montana shall be subject to attachment." This enactment was carried forward without alteration as section 96, Chapter 89, Laws of 1927. Sections 121 to 138 of Chapter 89, provide the man-[fol. 104] ner now existing for the liquidation of insolvent banks under the supervision of the superintendent of banks, which likewise assures the ratable distribution of the assets of an insolvent bank.

Since the decision in the Stanton case and subsequent thereto, with the right of attachment as against the bank denied by statute, it was and is impossible for a creditor whose claim was not reduced to judgment, to secure a preference against a banking corporation through involuntary proceedings. No like statutes exist with reference to the attachment of the property of other corporations or persons. The property of all persons and corporations, other than banking corporations, unless exempt from execution, is subject to attachment in any action upon a contract, express or implied, for the direct payment of money, where the contract is not secured by mortgage or pledge. (Sec. 9256, Rev. Codes 1921.) True, attachments against many insolvent corporations and individuals may be released and a preference avoided by recourse to proceedings under the bankruptcy law. Banking and insurance companies may not become bankrupts, either voluntary or involuntary. (11 U. S. C. A., Sec. 22.) Wage earners and persons engaged

either in farming or chiefly in the tillage of the soil may not be adjudged involuntary bankrupts. (Id.)

As to persons and corporations who may not be adjudged involuntary bankrupts, and as against whom writs of attachment may issue, no exception is made under our law whereby, as to such persons or corporations if insolvent, preferences resulting from attachments may be released at the instance of other creditors, resident or otherwise. The relegation of the creditors of insolvent corporations or individuals to a race of diligence "may be pernicious in its effect and may not result in justice according to judicial notion. The legislature has by the all-inclusive attachment laws made them applicable to all persons and corporations (except banking corporations) alike, without regard to the [fol. 105] solvency or insolvency of the attachment debtors. The legislature has spoken; it has declared the policy of the state, which is binding upon us.

It may be well to note in passing that the rights to secure writs of attachment in this state are available to residents and non-residents alike, as against residents and non-residents alike. A non-resident may come into Montana and secure a writ of attachment upon exactly the same terms as one of its citizens.

Full faith and credit must be given to the decree of the Iowa court and the statutes of that state in this respect, that Clark was entitled to the property, not as an ordinary receiver, but as a quasi-assignee of the dissolved corporation by force of statute entitled of right to defend or sue in its stead in this state. (United States Truck Co. v. Pennsylvania Surety Corporation, 259 Mich. 422, 243 N. W. 311.) But the laws of the state of Iowa do not have extraterritorial force. Rights and remedies of property are governed by the laws of the state in which it is situate. The statutory assignment can only be given force in other states on the ground of comity, not by constitutional mandate. (United States Truck Co. v. Pennsylvania Surety Corporation, supra; Martyne v. American Union Fire Ins. Co., 216 N. Y. 183, 110 N. E. 502, 23 L. R. A. 52.) The Supreme Court of the United States has written in the case of Disconto Gesellschaft v. Umbreit, 208 U. S. 570, 28 Sup. Ct. 337, 52 L. Ed. 625: " 'Comity,' in the legal sense," says Mr. Justice Gray, speaking for this court in Hilton

v. Guyot, 159 U. S. 113, 163, 16 Sup. Ct. 139, 40 L. Ed. 95, "is neither a matter of absolute obligation on the one hand nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows in its territory to the legislative, executive or judicial acts of another nation, having due regard both to the international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. [fol. 106] * * *. Speaking of the doctrine of comity, Mr. Justice Story says: 'Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded.' (Story on Conflict of Laws, sec. 33.) * * * The doctrine of comity has been the subject of frequent discussion in the courts of this country when it has been sought to assert rights accruing under the assignments for the benefit of creditors in other states as against the demands of local creditors, by attachment or otherwise in the state where the property is situated. The cases were reviewed by Mr. Justice Brown, delivering the opinion of the court in Security Trust Co. v. Dodd, Mead & Co., 173 U. S. 624, 19 Sup. Ct. 545, 43 L. Ed. 835, and the conclusion reached that voluntary assignments for the benefit of creditors should be given force in other states as to property therein situate, except so far as they come in conflict with the rights of local creditors, or with the public policy of the state in which it is sought to be enforced; and, as was said by Mr. Justice McLean in Oakey v. Bennett, 11 How. 33, 44, 'national comity does not require any government to give effect to such assignment [for the benefit of creditors] when it shall impair the remedies or lessen the securities of its own citizens.'"

It must be borne in mind that Clark, the statutory liquidator, did not appear in the courts of Montana and assert the right to have a receiver appointed until long after the levy of the execution. As was pointed out in the case of Clark v. Williard, supra, there is no invariable rule by which the title of a statutory liquidator must prevail over executions and attachments outside the state of his appointment. There are many cases there collected which lay down the rule that the title of such a liquidator will have recognition and enforcement everywhere without exception. Others

take the view that the claims of local creditors who have by process attached a lien upon the assets of the dissolved [fol. 107] corporation are entitled to precedence under facts in the material essentials in nowise different from the one now before us. (Lackmann v. Supreme Council O. C. & F., 142 Cal. 122, 75 Pac. 583; Zacher v. Fidelity Trust & Co., 109 Ky. 441, 59 S. W. 493; Schloss v. Metropolitan Surety Co., 149 Iowa, 382, 128 N. W. 384.) In the Iowa case a statutory liquidator of a dissolved insurance corporation from the state of New York was contesting the right of an attaching creditor within the state of Iowa to certain funds then under attachment. The Iowa court refused, on the principle of comity, to recognize the right of the foreign liquidator. Here we have an Iowa liquidator under a similar statute seeking the funds of the dissolved corporation upon the same principle of comity. The Iowa court, in reaching this conclusion said: "The well-settled rule in this state is that the claim of a foreign receiver to funds of the corporation found in this state will not be recognized even by way of comity if the result would be to relegate the creditors of the corporation in this state to the relief to which they would be entitled in a foreign jurisdiction, when there are funds of the corporation in the state from which such claims may be satisfied." After reviewing numerous decisions cited in the opinion in Clark v. Williard, supra, in support of the opposite theory, and holding them without application, the court further said: "It must be borne in mind that the receiver here defending is simply a receiver of an insolvent company who is by the corporation laws of New York authorized to collect the debts, preserve the property, and distribute the assets of the company among its creditors, and we fail to see how any receiver thus provided for can in this state, as against the established rule of our law, take the company's assets found in this state and seized for the plaintiff in an attachment proceeding, out of our state without satisfying the valid claim of the attaching creditor, and compel him to resort to the courts of New York for the purpose of secur- [fol. 108] ing payment of such claim." The Iowa court adhered to its pronouncements made in the Schloss case, in Reed v. Hollingsworth, 157 Iowa, 94, 135 N. W. 37.

In the case of In re Nelson & Brother Co., 149 Fed. 586, where it was sought, on the principle of comity, to secure

the validation of an assignment of creditors in a foreign state, and where the state of its origin by settled rule of decision had declined to accord extraterritorial vitality to like assignments, the court refused to recognize the assignment; and in the course of its opinion, speaking with reference to the principle of comity, said: "It involves reciprocity, and it appears to me to be clearly against the policy of any state to grant to the citizens of another jurisdiction a privilege from which its own citizens are debarred by the repeated decisions of the highest court of said jurisdiction. I am therefore of opinion that, upon principles of public policy, the claims of the attaching creditors are to be preferred to that of the assignor."

If the dissolved corporation were in Montana, and a statutory liquidator appointed in Montana under statutes identical with those of Iowa were making a like claim as against an attaching creditor under like circumstances, the Iowa courts under their established rules of decision would decline to accord the liquidator the right to secure priority over the attaching creditor. We, therefore, conclude that the liquidator from Iowa is entitled to receive no more consideration at the hands of our courts than would our citizens under like circuumstances in theirs.

It is argued by counsel for Clark that under the authority of Blake v. McClung, 172 U. S. 329, 20 Sup. Ct. 307, 43 L. Ed. 432, it is not within the power of the state to grant a preference or priority to local creditors over those from other states, by reason of the declaration in section 2, Article XIV, of the federal Constitution, providing that "the citizens of each state shall be en*e*ntitled to all privi- [fol. 109] leges and immunities of citizens in the several states." In the Blake case a statute of Tennessee provided generally that foreign mining corporations might operate in the state by complying with the provisions of the Act; that the corporations coming within the Act and their property were liable for their debts, to be enforced in the manner provided by law for the application of the property of natural persons to the payment of their debts, but creditors, residents of the state, were to be accorded a priority in the distribution of the assets of the corporation over creditors residing without the state. These facts clearly distinguish that case from the one at bar. Here, any creditor, whether resident or not, was free at the time the levy of the execu-

tion was made, to secure an attachment against the property of the Federal Surety Company. There is no denial of any privilege accorded to a Montana creditor to any nonresident creditor.

The cause is remanded to the district court of Cascade county with direction to modify the order of August 25, 1932, to the end that the lien of appellants acquired by virtue of the levy of the execution is determined to be valid as against and prior to the claim of the respondent Clark, and of the receiver appointed by the district court; that the claim of the respondent Clark, and of the receiver so appointed, is superior to the claim of all persons attempting to assert a lien on the assets of the Federal Surety Company which was not perfected prior to August 3, 1932. The order of August 25, 1932, will, when so modified, stand affirmed. The appellants will recover their costs in this court.

Ralph J. Anderson, Associate Justice.

We concur:

John A. Matthews, S. V. Stewart, Associate Justices

[fol. 110] Mr. Chief Justice CALLAWAY dissenting:

The Supreme Court of the United States has directed us to determine whether there is any local policy in this state whereby an insolvent foreign corporation in the hands of a liquidator with title must submit to the sacrifice of its assets or to their unequal distribution by writs of execution. In its discussion before reaching that direction, the Supreme Court said: "No statute or decision brought to our notice from Montana removes the question from the field of doubt. True, there are the statutes heretofore referred to whereby suit may be maintained against foreign corporations after dissolution on the same basis as against domestic ones. Nothing in those provisions declares the existence of a policy to allow the assets of an insolvent corporation to be torn to pieces at the suit of rival creditors when they could be distributed equally and without sacrifice at the hands of a receiver."

I do not know of any such policy announced by statute or decision in this state, and determine the question in the negative.

The Supreme Court agrees with the statement in the original opinion of this court promulgated April 1, 1933, that

the judgment of the respondents against the Federal Surety Company is valid, but does not agree that the levy of execution was valid. To make its decision upon that point certain, it declared "the decree should be vacated in so far as it adjudges the validity and priority of the respondents' execution, * * *", taking the view that before the respondents were in a position to issue execution, the situation had been complicated by the suit filed by Mieyr for the purpose of obtaining an ancillary receivership to preserve the local assets.

I think it is unnecessary to discuss the question whether in the circumstances the appointment of Crichton on March 25, 1932, was valid, whether made under section 9301 or [fol. 111] 9303, Revised Codes 1921. It seems to me that when Clark on August 3 served and filed an answer and cross-petition in the action wherein he pleaded the dissolution of the Federal Surety Company, and his appointment as "receiver and/or liquidator" under the laws of Iowa and that title to all the surety company's property passed to him, alleging that the assets should be distributed ratably to all creditors "subject to any liens and rights of creditors acquired on or prior to September 25, 1931, in or to specific property," and wherein he asked that Crichton be retained as receiver, the district court of Cascade county then had authority to appoint, or re-affirm, the appointment of Crichton as receiver.

The Supreme Court has declared that this court denied full faith and credit to the statutes and judicial proceedings of Iowa in holding that Clark was a receiver deriving title through a judicial proceeding, and not through the charter of Federal Surety Company's being and the succession there prescribed.

After a careful consideration of the authorities I am satisfied that the action of the district court of Cascade county on August 25, 1932, wherein that court held that the existence of the Federal Surety Company was terminated by the proceedings in Iowa, and that the title to all its property passed to Clark as receiver (charter liquidator), and should be distributed ratably to all creditors "subject to any liens and rights of creditors acquired on or prior to September 25, 1931, in or to specific property" was correct. The court then confirmed the appointment of Crichton as

ancillary receiver and directed that he receive proof of claims of all Montana creditors by requiring the claims to be filed with the clerk of the court in Cascade county, and provided further that when the claims allowed by its order were allowed by the Iowa court as entitled to share with the other claims of similar rank, Crichton should transmit and remit to the clerk all money and property in his hands as receiver, except such as were determined by the district [fol. 112] court of Cascade county to be subject to specific lien, and such as might be necessary to pay the costs of proceedings in Montana, including the compensation of Crighton. It also provided that in the event claims allowed by the district court of Cascade county were not allowed in such manner as to permit claimant to share ratably with all other creditors of the surety company, then the money and property in the hands of Crichton should be retained by Crichton for distribution to creditors whose claims were allowed by order of the District court of Cascade county. The decree directed all persons to deliver to Crichton all money and property belonging to the surety company. It also revoked the order of May 24, 1932, granting permission to Williard, Wheaton and Hay, as trustees, to levy their execution. (Mieyr v. Federal Surety Co., 94 Mont. 508, 23 Pac. (2d) 959.)

Of course, attachments existing upon specific property or judgments being a lien upon real estate prior to the dissolution of the Federal Surety Company would have been preferred claims and payable as such, but the judgment of Williard, Wheaton and Hay, as trustees, was not a preferred claim. This judgment was not a lien on the property of the surety company when Mieyr began his action.

In the absence of preferred claims, I think it is the rule, sustained by the great weight of authority, that "during the winding-up proceedings after dissolution, no creditor will be permitted by legal process or otherwise to acquire priority, or to enforce his claim against the property held for distribution as against the rights of other creditors." (8 Thompson on Corporations, sec. 6567 (6611); Engineering Co. v. Perryman Elec. Co., N. J. Eq., 166 Atl. 461.) Rohr v. Stanton Trust & Savings Bank, 76 Mont. 248, 245 Pac. 947, while relating to the liquidation of a bank pursuant to statute, recognizes the principle above set forth.

[fol. 113] Furthermore, as I understand the opinion of the Supreme Court of the United States, there being no local policy expressed in statute or decision whereby judgments and attachments, secured after the title to the property of the corporation has passed to a charter liquidator, have preference over his title, we should affirm the orders and judgment of the district court of Cascade county, from which the appeals in this case originated.

Lew L. Callaway, Chief Justice.

Mr. Justice Angstman, dissenting:

I find myself unable to concur in the opinion written by Mr. Justice Anderson. The single question left for this court to pass upon under the mandate of the United States Supreme Court, is "whether there is any local policy whereby an insolvent foreign corporation in the hands of a liquidator with title must submit to the sacrifice of its assets or to their unequal distribution by writs of execution." The United States Supreme Court in considering this question said that it "is involved in confusion with decisions pro and con." But it also said: "The tendency in most of the states is to give priority to the title unless a contrary policy is expressed with reasonable clarity." It cited in support of the rule, Martyne v. American Union Fire Ins. Co., 216 N. Y. 183, 110 N. E. 502; Kinsler v. Casualty Co., 103 Neb. 382, 172 N. W. 22; Bockover v. Life Association of America, 77 Va. 85, and Cogliano v. Ferguson, 245 Mass. 364, 139 N. E. 527. To those may also be added the case of Engineering Co. v. Perryman Elec. Co., N. J. Eq., 166 Atl. 461, where the court said: "It is a well-established rule of law that all creditors of a corporation, wherever residing, are entitled, in case of its insolvency, to have its general assets distributed among them upon principles of perfect [fol. 114] equality, and that the courts of one state have no right to favor domestic creditors; therefore, this court cannot apply the assets in possession of its receivers to the payment of claims of creditors who are residents of this state in disregard of the rights of creditors who are residents of other states. Distribution must be made upon the principle that equality is equity." Such is the rule stated by Thompson in his work on Corporations, Vol. 8, section 6566, third ed. That author also said: "During the winding-up proceedings after dissolution, no creditor will be

permitted by legal process or otherwise, to acquire priority, or to enforce his claim against the property held for distribution as against the rights of other creditors." (8 Thompson on Corporations, p. 758.)

Sections 6011 and 9303, Revised Codes 1921, and the cases cited and quoted from in the majority opinion interpreting these sections, have no application here. They do not deal with insolvent corporations. The cases of Gilna v. Barker, 78 Mont. 357, 254 Pac. 174, and Gilna v. Barker, 78 Mont. 343, 254 Pac. 169, were cases where the statutory trustees of a corporation whose charter life had expired, were sued on contracts made by them after they became such trustees. The case of Frost v. Heslet, 19 Mont. 188, 47 Pac. 805, simply holds that a corporation, while a going concern, may, when insolvent, prefer one creditor over another. It does not aid us in the question here under consideration. The rule is otherwise where, as here, the corporation is both insolvent and has suspended business. (8 Thompson on Corporations, secs. 6188 and 6198.) We so held in Cabot Inc. v. Gas Products Co., 93 Mont. 497, 19 Pac. (2d) 878. That a creditor of either a foreign or domestic insolvent corporation, dissolved by order of court, may thereafter obtain a preference over other creditors by execution on the funds of the corporation held in trust by the liquidator for the benefit of creditors seems to me preposterous.

In those cases holding that the title of the statutory re-
[fol. 115] ceiver on dissolution of a foreign insolvent corporation is subject to execution, it is only so held in favor of creditors residing in the state where the execution is sought. This is the rule in Iowa. (Schloss v. Metropolitan Surety Co., 149 Iowa, 382, 128 N. W. 384; Watts v. Southern Surety Co., (Ia.), 248 N. W. 347.) Emphasis is placed upon the Iowa decisions by my associates in the foregoing opinion. Iowa does not recognize the right of a foreign liquidator even by way of comity, when to do so would relegate local creditors to a foreign jurisdiction to obtain the relief to which they are entitled.

We are here dealing with the rights of local creditors by virtue of an execution. But to avoid the force and effect of the case of Blake v. McClung, 172 U. S. 239, 43 L. Ed. 432, 20 Sup. Ct. 307, which prohibits a state from favoring resident creditors over nonresident ones, the majority of my associates are announcing the startling policy, unheard of

elsewhere, that any creditor, whether resident or foreign, may obtain such a preference. This policy, I venture to say, this court will hasten to reverse when a foreign creditor seeks its benefit to the prejudice of local creditors.

Under the sweeping policy announced in the opinion by Mr. Justice Anderson, a vigilant foreign creditor will be permitted to levy execution upon property in this state of a dissolved, insolvent foreign corporation and obtain a preference over Montana creditors, as against property situated in Montana. From this position this court will certainly retreat when a case is presented where a foreign creditor seeks by execution to obtain a preference over domestic creditors. Moreover, this is not a case where we can properly announce a policy on grounds of reciprocity. The majority think that, since Iowa would not recognize a Montana liquidator, we should not recognize an Iowa liquidator. It should be borne in mind that no Iowa creditors are here involved. The policy announced by this [fol. 116] court may not affect Iowa creditors at all. It may affect Idaho creditors, and creditors from other states wherein a different rule prevails from that established in Iowa. However desirable it might be to prefer resident creditors over nonresident ones, this may not be done without violating the federal Constitution. (Blake v. McClung, supra.)

On one other ground I think the conclusion announced by the majority is erroneous. I think this court erred in the interpretation of our statutes on the former hearing in this case (94 Mont. 508, 23 Pac. (2d) 959), wherein it is held that the corporate life of the dissolved corporation was continued by our statutes for the purpose of obtaining judgment and execution. My reasons for so thinking are set forth in my dissenting opinion in that case. The Supreme Court of the United States could not, of course, consider that question. It was bound by the interpretation placed upon our statutes by this court. That is elementary law. That court only considers federal questions. At the very outset of the opinion of the United States Supreme Court, when reaching the merits of the case, it said: "We assume in accordance with the decision of the Montana court, that the respondents' action against the surety company did not abate on dissolution, but was lawfully pursued to judgment." There was nothing else for that court to do, for

under its repeated decisions it is bound by the interpretation placed by a state court upon its own statutes.

For the reasons stated in my dissenting opinion on the former appeal, I think the judgment and execution were ineffectual, and that the claim here involved stands only upon an equality with the claims of other creditors wherever residing. I also think this should be the policy to be announced by this court if it be assumed that the judgment against the dissolved corporation be valid. I think the judgment entered by the trial court gave the creditors here complaining all the protection to which they were and are entitled and that it should be affirmed.

Albert H. Angstman, Associate Justice.

[fol. 117] MINUTES OF THE SUPREME COURT, THIRTY-FIRST DAY OF JUNE TERM, 1934

Tuesday, July 24, 1934.

Court convened pursuant to recess.

Present: The Hon. Lew. L. Callaway, Chief Justice; The Hon. Albert H. Angstman, Associate Justice; The Hon. John A. Matthews, Associate Justice; The Hon. S. V. Stewart, Associate Justice, The Hon. Ralph J. Anderson, Associate Justice; J. W. Crosby, Clerk; Floyd O. Small, Marshal.

And the following proceedings were had:

7074

JOHN MIEYR, Respondent,

v.

FEDERAL SURETY COMPANY OF DAVENPORT, IOWA, et al., Respondents; D. A. Crichton, Ancillary Receiver, Respondent; Harry O. Williard, et al., Appellants

This cause this day came on for judgment and decision. Whereupon, on consideration it is now here ordered and adjudged by this Court that the cause be, and it is hereby remanded to the district court of Cascade county with direction to modify the order of August 25, 1932, to the end that the lien of the appellants acquired by virtue of the levy

of the execution is determined to be valid as against and prior to the claim of the respondent Clark, and of the receiver appointed by the district court; that the claim of the respondent Clark, and of the receiver so appointed, is superior to the claim of all persons attempting to assert a lien on the assets of the Federal Surety Company which was not perfected prior to August 3, 1932. The order of August 25, 1932, will when so modified, stand affirmed. The appellants will recover their costs in this Court. Opinion by Mr. Justice Anderson, concurred in by Mr. Justice Matthews and Mr. Justice Stewart. Mr. Chief Justice Callaway and Mr. Justice Angstman, dissenting.

There being no further matter presented the Court went into recess.

Lew. L. Callaway, Chief Justice.

Attest: J. W. Crosby, Clerk.

[fol. 118] In the Supreme Court of the State of Montana

John Mieyr, Respondent,

vs.

Federal Surety Company of Davenport, Iowa, a Corporation, and E. W. Clark, as Receiver of Federal Surety Company of Davenport, Iowa, Respondents; Harry O. Williard, W. W. Wheaton and C. W. Hay, as Trustees of Gordon Campbell-Kevin Syndicate, a Common Law Trust, and Gordon Campbell-Kevin Syndicate, a Common Law Trust, Appellants

Request for Stay of Remittitur

To the Honorable, the above-entitled Court and the Justices thereof;

You are hereby advised that it is the intention of E. W. Clark, as Receiver, one of the parties to the above-entitled cause, to make application to the Supreme Court of the United States for a writ of certiorari for the purpose of bringing before said court for review the judgment of the above-entitled court in the above-entitled cause, rendered

on the 24th day of July, 1934, upon the grounds and for the reasons, among others, that the decision and said judgment does not give full faith and credit to the order and judgment of the Iowa court appointing E. W. Clark receiver, and fails to conform to the mandate of the Supreme Court of the United States.

Dated this 30th day of July, 1934.

Filed July 30, 1934. J. W. Crosby, Clerk of the Supreme Court, State of Montana, by O. T. Crane, Act. Clk.

Gunn, Rasch, Hall & Gunn, Attorneys for E. W. Clark, Receiver, by M. S. Gunn.

[fol. 119] IN THE SUPREME COURT OF THE STATE OF MONTANA

JOHN MIEYR, Respondent,

vs.

FEDERAL SURETY COMPANY OF DAVENPORT, IOWA, a Corporation, and E. W. Clark, as Receiver of Federal Surety Company of Davenport, Iowa, Respondents; Harry O. Williard, W. W. Wheaton and C. W. Hay, as Trustees of Gordon Campbell-Kevin Syndicate, a Common Law Trust, and Gordon Campbell-Kevin Syndicate, a Common Law Trust, Appellants

ORDER STAYING REMITTITUR OR MANDATE

It appearing that E. W. Clark, as Receiver, one of the respondents above named, intends to make application to the Supreme Court of the United States for a writ of certiorari for the purpose of bringing before said Court for review the judgment of the above-entitled court in the above-entitled cause, rendered on the 24th day of July, 1934, and that there is reasonable ground for said application, upon motion of Gunn, Rasch, Hall & Gunn, attorneys for said E. W. Clark, as Receiver, it is ordered that the remittitur or mandate in said cause shall not issue, but shall be stayed until the 15th day of September, 1934, and that if on or before said date there is filed with the Clerk of this Court an affidavit of one of the attorneys for said E. W. Clark, as Re-

ceiver, showing that such application by proper petition for writ of certiorari has been made in compliance with the rules of the Supreme Court of the United States, that the said remittitur or mandate shall be stayed for a further period thereafter, and shall not issue before final disposition shall be made by the Supreme Court of the United States of said application or petition.

[fols. 120-123] The stay hereby granted is upon the condition that there be filed with the Clerk of this Court within five (5) days from the date hereof a good and sufficient bond in the penal sum of $500.00, approved by one of the Justices of this Court, conditioned that if said application for such writ is not made on or before the 15th day of September, 1934, or if such application is not granted, or the said E. W. Clark, as Receiver, fails to make his plea good in the said Supreme Court of the United States, he will answer for all damages and costs which the appellants above named may sustain by reason of said stay.

Dated this 30th day of July, 1934.

Filed July 30, 1934. J. W. Crosby, Clerk of the Supreme Court, State of Montana, by O. T. Crane, Act. Clk.

Llewellyn L. Callaway, Chief Justice of the Supreme Court of the State of Montana.

[fol. 1]

IN SUPREME COURT OF MONTANA

JOHN MIEYR, Respondent,

vs.

FEDERAL SURETY COMPANY OF DAVENPORT, IOWA, a Corporation, and E. W. Clark, as Receiver of Federal Surety Company of Davenport, Iowa, Respondents; Harry O. Williard, W. W. Wheaton, and C. W. Hay, as Trustees of Gordon Campbell-Kevin Syndicate, a Common-law Trust, and Gordon Campbell-Kevin Syndicate, a Common-law Trust, Appellants

[Caption omitted]

IN DISTRICT COURT OF EIGHTH JUDICIAL DISTRICT OF MONTANA IN AND FOR CASCADE COUNTY

[Title omitted]

Bill of Exceptions Prepared on Behalf of Harry O. Williard, W. W. Wheaton, and C. W. Hay, as Trustees of Gordon Campbell-Kevin Syndicate, a Common-law Trust, and on behalf of said Last-named Syndicate

Be it remembered that on the 25th day of August, 1932, an Order, Judgment or Decree, hereinafter set forth, and entitled "Order Confirming Appointment of Receiver", wherein and whereby the alleged rights of the said Harry O. Williard, W. W. Wheaton and C. W. Hay, as Trustees of Gordon Campbell-Kevin Syndicate, creditors of Defendant Federal Surety Company, herein, said alleged rights were claimed to be affected, was made and entered herein out of the presence of said Harry O. Williard, W. W. Wheaton and C. W. Hay, as such Trustees, and out of the presence of their attorneys, Louis P. Donovan and Belden & DeKalb, but after a hearing and argument of counsel were had and briefs were submitted; that theretofore, on the 24th day of May, 1932, the said above named creditors presented their Petition and secured from the Court an order allowing the levy of executions, under judgments theretofore obtained by them, upon moneys belonging to Federal [fol. 2] Surety Company, which said Order, the Receiver appointed herein, D. A. Crichton, moved this Honorable Court on July 25th, 1932, to vacate, all as hereinafter set forth, and acted upon, as hereinafter set forth; and the Motion of said above named creditors filed herein on August 31st, 1932, attacking the said Order Confirming Appointment of Receiver, made and entered herein August 25th, 1932, which said Motion, as hereinafter set forth, was filed and came on for hearing, as hereinafter set forth, on August 31st, 1932, before H. H. Ewing, the Judge having jurisdiction of said cause, and that the said Motions and Orders were based upon the files and records and evidence, as herein set forth, and none other, all of which, in full substance, are in the words and figures as follows, to-wit:

That on the 25th day of March, 1932, Plaintiff filed his Complaint herein in the words and figures as follows, to-wit:

COMPLAINT—Filed March 25, 1932

Plaintiff complains of the defendants and alleges:

1

That on or about the 25th day of October, 1929, at Great Falls, Montana, for a valuable consideration, the plaintiff and Federal Surety Company made and entered into a certain contract of insurance in writing, a copy of which is hereto attached, marked Exhibit "A", and by this reference made a part hereof.

2

That on or about the 9th day of June, 1930, while said insurance was in full force and effect, the plaintiff suffered a loss from the liability imposed by law upon the assured for damages on account of bodily injuries accidentally suffered by one Elizabeth Mieyr, who, at the time, and at all the times herein mentioned, was not a chauffeur or an employee of the plaintiff, which loss occurred in the State of Montana, United States of America, by reason of the ownership, maintenance, use and operation of an automobile specifically described in said contract, to-wit: a certain Chandler Sedan, Factory or Serial No. C 30857, Motor [fol. 3] No. C 30857, 1928 Model, while the Plaintiff was using the same for pleasure.

3

That immediately upon suffering said loss, plaintiff notified the authorized agent of the said insurance company of said loss and thereafter there was instituted in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, a certain action upon said loss or liability in which the said Elizabeth Mieyr was plaintiff and the Plaintiff herein, John Mieyr, was defendant; that immediately upon the papers in said cause being served upon the plaintiff he notified and turned over said papers to the authorized agent of the Federal Surety Company, and the Federal Surety Company, by and through its Attorney, O. B. Kotz,

entered an appearance in said suit by Demurrer, and the said Federal Surety Company undertook to defend the plaintiff herein in said suit, and that thereafter such proceedings were had that on the 22nd day of March, 1932, there was duly given and made in said Court, a Judgment against the Plaintiff herein, in the sum of Two Thousand, Seven Hundred Forty-two and 70/100 Dollars ($2,742.70), upon said liability imposed by law for damages on account of the bodily injury sustained by the said Elizabeth Mieyr.

4

That thereupon, and thereby, the said Federal Surety Company became indebted to the plaintiff in the sum of Two Thousand, Seven Hundred Forty-two and 70/100 Dollars ($2,742.70) no part of which has been paid, and the whole thereof is now due and owing from the said Federal Surety Company to the plaintiff.

5

That at all times herein mentioned prior to September 25th, 1931, the said Federal Surety Company was a corporation duly organized and existing under and by virtue of the laws of the State of Iowa, and that on the 25th day of September, 1931, there was in full force and effect Section 8402 of the Code of Iowa of 1927 and of 1931, being Section 1640 of the Code of Iowa of 1897, which provides as follows:

[fol. 4] "Courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, and to appoint a receiver therefor, who shall be a resident of the State of Iowa. An action therefore may be instituted by the attorney general in the name of the state, reserving, however, to the stockholders and creditors all rights now possessed by them."

and Section 8964 of the Code of Iowa of 1927 and of the Code of 1931, being Section 1731 of the Code of 1897, which provides as follows:

"The commissioner of insurance shall, when he finds it expedient, appoint one or more persons, not officers, agents or stockholders of any insurance company doing business in the state, to examine into the affairs and conditions of any such company incorporated or doing business therein,

or make such examination himself, and the officers or agents thereof shall produce their books for the inspection of the examiners and otherwise assist therein, so far as they can do so; and in conducting the investigation they may examine under oath the officers or agents of any company, or others, relative to the business and condition of the company, and the result thereof shall be published in one or more papers in the state, when the commissioner believes the public interest requires it. When it appears to the commissioner from such examination that the assets and funds of any company incorporated in this state are reduced or impaired by its liabilities, as defined under the head of liabilities in the statement required by this chapter, more than twenty per cent below the paid-up capital stock required, he shall direct the officers thereof to require the stockholders to pay in the amount of such deficiency within such a period as he may designate in such requisition, or he shall communicate the fact to the attorney general, who shall apply to the district court, or if in vacation to one of the judges thereof, for an order requiring the company to show cause why its business shall not be dissolved. The court or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it appears to its or his satisfaction that the assets and funds of said company are not sufficient, as aforesaid, or that the interest of the public requires it, it or he shall decree a dissolution of said company and a dis-[fol. 5] tribution of its effects, and appoint a receiver therefor. The application of the attorney general may be by the court or the judge sent to a referee to inquire into and report upon the facts stated therein, which report shall be made to the court or judge."

and Section 8613-c1 of the Code of Iowa of 1931, being Chapter 233 of the Acts of the 43rd General Assembly of Iowa, which provides as follows:

"The commissioner of insurance henceforth shall be the receiver and/or liquidating officer for any insurance company, association or insurance carrier, and shall serve without compensation other than his stated compensation as commissioner of insurance, but he shall be allowed clerical and other expenses necessary for the conduct of such receivership."

6

That on or about the 25th day of September, 1931, in the District Court of the State of Iowa, in and for the County of Scott, in Equity Cause #28238, entitled "State of Iowa, ex rel, John Fletcher, Attorney General, vs. Federal Surety Company, of Davenport, Iowa," judgment was duly given and made in said cause, dissolving said corporation and appointing one E. W. Clark Receiver and/or Liquidating Officer of said corporation, to take title to all property of the dissolved corporation for the purpose of liquidating its affairs and distributing its assets as by law provided.

7

That the said Federal Surety Company is indebted to citizens of Montana, residing within the State of Montana in a sum in excess of Fifty Thousand Dollars ($50,000.00).

8

That the said Federal Surety Company has property within the State of Montana consisting of cash money in the hands of the Industrial Accident Commission for the State of Montana, in the sum of Twenty-five Thousand Dollars ($25,000.00); that the said Federal Surety Company has a judgment duly given and made by the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark against the [fol. 6] Fidelity and Deposit Company of Maryland, of the value of more than Fifteen Thousand Dollars ($15,000.00); that the said Federal Surety Company has in *d*ustodia legis within the State of Montana the sum of Ten Thousand Dollars ($10,000.00) and has the further sum of Three Thousand Five Hundred Dollars ($3,500.00) cash in hands of trustees in the State of Montana, and that the said R. W. Clark, through his agents and representatives, is now in the State of Montana attempting to compromise, settle and discount said assets and procure possession of such portions thereof as he can and remove the same out of the State of Montana, and that unless a Receiver is appointed within the State of Montana to take charge of said property, and preserve the same for the creditors of this State, and the general creditors of the said Federal

Surety Company, the same will be dissipated and lost to said creditors; that none of said sums can be levied upon by process issued from any Court of this State by attachment, execution or otherwise; that said Federal Surety Company is wholly insolvent and has been dissolved by a Court of competent jurisdiction by Order duly given and made in a proceedings properly instituted before said Court.

9

That unless a Receiver is appointed of the assets of said Corporation within the State of Montana, the plaintiff and the creditors of the State of Montana will be compelled to go into a foreign jurisdiction to collect their debts or their proper proportion of the assets of said corporation, and to litigate the propriety of their debts or claims; that said funds should be maintained and retained within the State of Montana until the proportionate shares of the creditors of the State of Montana have been ascertained and determined and these decreed and paid out of the local assets before transferring any of the funds to the domiciliary administration or receiver.

10

That by the decree of the Court of Iowa above mentioned, said Federal Surety Company of Davenport, Iowa, has ceased to exist as a corporate entity, and its successor, the said E. W. Clark, Receiver of said Federal Surety Company of Davenport, Iowa, is beyond the jurisdiction [fol. 7] of this Court and that unless a Receiver is appointed pendente lite and without notice, all the assets of said Federal Surety Company of Davenport, Iowa, will be removed beyond the jurisdiction of the Courts of the State of Montana and beyond the jurisdiction of this court before service of process can be had upon the defendants, or notice of application for appointment of a Receiver be served and a hearing thereon had.

11

That D. A. Crichton of Great Falls, Montana, is a fit and proper person to act as Receiver herein and that he is not a party hereto or interested herein, or an attorney for any

party or person interested herein, and is familiar with the assets of the defendant Federal Surety Company of Davenport, Iowa.

Wherefore Plaintiff prays judgment and decree of this Court.

First. Judgment against the defendants for the sum of Two Thousand Seven Hundred Forty-two and 70/100 Dollars ($2,742.70), together with interest thereon at the rate of eight per sent per annum from and after the 22nd day of March, 1932.

Second. That the plaintiff be decreed to have a valid claim against the Federal Surety Company of Davenport, Iowa, in the sum of Two Thousand, Seven Hundred Forty-two and 70/100 Dollars ($2,742.70), with interest thereon at the rate of eight per cent per annum from and after the 22nd day of March, 1932.

Third. That a Receiver be appointed to take possession of, conserve and preserve all of the assets of the Federal Surety Company of Davenport, Iowa, within the State of Montana, and to hold the same until the further order of this Court, and that he be given the usual powers of Receivers appointed by this Court.

Fourth. That D. A. Crichton be appointed such Receiver.

Fifth. That in the event that it is determined that the assets of the Federal Surety Company of Davenport, Iowa, are insufficient to pay all of its creditors in full, that your plaintiff be paid his proportionate share of such assets.

[fol. 8] Sixth. For his costs and disbursements herein extended and for such other and further relief as to the Court may seem just.

Molumby, Busha & Greenan, Attorneys for Plaintiff.

(Duly verified.)

EXHIBIT "A" TO COMPLAINT

The Exhibit "A" annexed to the Complaint was in full substance an automobile liability policy issued by the Federal Surety Company, dated October 25th, 1929, providing for compensation in certain events to the insured, John

Mieyr, of Great Falls, and sustaining the allegations of Plaintiff's Complaint, where reference thereto is made to said exhibit.

That summons duly issued in said cause and service of said Summons was duly made by the Sheriff of Lewis and Clark county, Montana, upon George P. Porter, State Auditor and Commissioner of Insurance of the State of Montana on the 31st day of May, 1932, and return thereof duly made to said Court; that upon the said Complaint being filed, and based exclusively thereon, on the 25th day of March, 1932, the Court made an order appointing D. A. Crichton, of Great Falls, Montana, in the words and figures as follows, to-wit:

ORDER APPOINTING RECEIVER—Filed March 26, 1932

On motion of Molumby, Busha & Greenan, counsel for the Plaintiff, and upon the Summons and positively verified Complaint herein and it appearing to the Court therefrom that there is immediate danger that the property mentioned in said Complaint and all of the property of the Federal Surety Company of Davenport, Iowa, within the State of Montana, will be removed beyond the jurisdiction of this Court, and that the delay resulting from giving Notice of Motion for the appointment of the Receiver in this case would defeat the very right which plaintiff seeks to protect, and imperil the property involved in this action.

It is ordered that Noticce of said Motion be dispensed with upon furnishing an undertaking in the sum of Two [fol. 9] Thousand Dollars, and that D. A. Crichton of the City of Great Falls, County of Cascade, State of Montana, be and he is hereby appointed Receiver of all of the property of the Federal Surety Company within the State of Montana, upon his being sworn to perform his duties faithfully and executing, acknowledging and filing with the Clerk of this Court a bond with sufficient sureties to be approved by the Judge of this Court, *a bond with sufficient sureties to be approved by the judge of this court* in the usual form in the sum of Sixty Thousand Dollars to the effect that he, the said Receiver, will faithfully discharge

the duties of the Receiver in the action, and obey the Orders of the Court herein.

It is further ordered that the Receiver be vested with all the powers and rights of Receivers appointed by this Court, and with the power to take possession of all property heretofore belonging to the said Federal Surety Company of Davenport, Iowa, and to collect all sums owing to the said Federal Surety Company of Davenport, Iowa, and to keep and preserve the same and manage and disburse the same, according to the further order of this Court.

Done in Open Court this 25th day of March, 1932.

H. H. Ewing, Judge.

That thereafter the said D. A. Crichton took and subscribed an oath, as Receiver, in the words and figures as follows, to-wit:

OATH OF RECEIVER—Filed March 26, 1932

STATE OF MONTANA,
County of Cascade, ss:

I, D. A. Crichton, do solemnly swear that I will faithfully perform, according to law, the duties of Receiver in the above entitled matter.

D. A. Crichton.

Subscribed and sworn to before me this 26th day of March, 1932. My commission expires December 3, 1934. C. T. Busha, Jr., Notary Public for the State of Mont., Residing at Great Falls, Montana. (Notarial seal.)

[fol. 10] That concurrently therewith the said D. A. Crichton made and executed a good and sufficient bond in accordance with said Order appointing him.

On the 31st day of March, 1932, the Defendant E. W. Clark appeared in said action by a Notice of Motion in the words and figures as follows, to-wit:

NOTICE OF MOTION TO DISCHARGE RECEIVERS—Filed Apr. 5, 1932

To John Mieyr, plaintiff above named, and his attorneys, Molumby, Busha & Greenan:

Please take notice that the defendant, E. W. Clark, Receiver and Liquidating Officer of the Federal Surety Company of Davenport, Iowa, appearing specially for the purpose of the Motion, notice of which is hereby given, and for no other purpose, will by the undersigned his attorneys, on the 5th day of April, 1932, at the hour of 10:00 o'clock A. M., or as soon thereafter as a hearing can be had, move the above entitled court in the department in which said action is pending to discharge the Receiver appointed in said action and vacate and set aside the order of appointment upon the ground and for the reason that said Court was without jurisdiction to make such appointment. Said Motion will be based upon the complaint in said action.

Dated this 31st day of March, 1932.

Gunn, Rasch, Hall & Gunn, Attorneys for E. W. Clark, Receiver and Liquidating Officer of the Federal Surety Company of Davenport, Iowa, appearing specially for the purpose of this motion, notice of which is hereby given, and for no other purpose.

That the said Notice of Motion was served upon the Plaintiff and his attorneys, Molumby, Busha & Greenan, and duly and regularly came on for argument thereafter, on the 5th day of April, 1932, and was by the Court taken under advisement.

Thereafter, on the 24th day of May, 1932, said Motion was denied by an Order of the Court, duly given and made in the words and figures as follows, to-wit:

[fol. 11] ORDER DENYING MOTION—Filed May 24, 1932

Defendants' Motion to discharge the Receiver in the above entitled action, and vacate and set aside the Order of his appointment, coming on regularly to be heard, and having been submitted to the Court, and the Court being advised,

It is ordered that said motion be, and the same is hereby, denied.

Dated this 24th day of May, 1932.

H. H. Ewing, Judge.

That on the 24th day of May, 1932, Harry O. Willard, C. W. Hay, and W. W. Wheaton, as Trustees of the Gordon Campbell-Kevin Syndicate, presented their verified Petition and prayed for leave to levy their Executions upon property of Federal Surety Company within the State of Montana, in the words and figures as follows, to-wit:

PETITION TO LEVY EXECUTION—Filed May 24, 1932

Come now Harry O. Williard, C. W. Hay, and W. W. Wheaton, as Trustees of the Gordon Campbell Kevin Syndicate, a common law trust, and respectfully show the Court:

That on the 20th day of May, 1932, in the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, in a case then pending in said Court entitled: Harry O. Williard, C. W. Hay, and W. W. Wheaton, as Trustees of the Gordon Campbell Kevin Syndicate, a common law trust, plaintiffs, vs. Federal Surety Company, a corporation, defendant, said Court duly gave and made its Judgment in said action that said plaintiffs, Harry O. Williard, C. W. Hay, and W. W. Wheaton, as Trustees of the Gordon Campbell Kevin Syndicate, a common law trust, have and recover from said defendant, Federal Surety Company, a corporation, the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of eight per cent per annum from the 2nd day of March, 1926, making a total judgment for principal and interest of Fourteen Thousand Nine Hundred Sixty-eight and 90/100 Dollars ($14,968.90), and [fol. 12] for said plaintiffs' costs and disbursements in said action taxed in the sum of Ten and 50/100 Dollars ($10.50).

That on or about the 24th day of March, 1932, petitioners duly served and filed in the office of the Clerk of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, Petitioners' Costs on appeal in said action entitled Harry O. Williard, C. W. Hay and W. W. Wheaton, as Trustees of the Gor-

don Campbell Kevin Syndicate, a common law trust, plaintiffs, vs. Federal Surety Company, a corporation, defendant, amounting to the total sum of One Hundred forty-eight and 40/100 Dollars ($148.40), to which costs bill on appeal said defendant, Federal Surety Company, a corporation, made no objection and the same became final and in effect a judgment against the Federal Surety Company.

That Petitioners have heretofore discovered assets within the State of Montana belonging to the defendant Federal Surety Company, and Petitioners have issued executions out of the said District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, upon its judgments above mentioned, and petitioners desire to levy said executions upon the property of said defendant, Federal Surety Company, and subject such property to the payment of said judgments.

Wherefore petitioners respectfully pray for an Order of this Court permitting Petitioners to levy their executions upon any property within the State of Montana belonging to the defendant Federal Surety Company, a corporation, notwithstanding the Order of the Court heretofore made in this action on or about the 26th day of March, 1932, appointing a Receiver in this action.

Louis P. Donovan, Belden & DeKalb, Attorneys for Petitioners.

(Duly verified.)

That thereupon, on the 24th day of May, 1932, the Court made and entered herein an Order on said verified Petition, after due and regular service of said Petition upon the attorneys for the Plaintiff, in said cause, and attorneys for the Receiver therein, who were present at said hearing, [fol. 13] upon representations of petitioners that they had levied execution without the knowledge of the Receivership, and wished an order of the Court to purge them of contempt if any was committed, upon the further representation that in the event of an appeal from the order of May 24, 1932, refusing to vacate the order appointing a receiver, and in the event such order was reversed on appeal, they would have a lien by execution as against any claim to such assets by E. W. Clark, Receiver and Liquidating Officer of the Federal Surety Company of the State

of Iowa, and could thus litigate their claim in this state, and with the understanding announced by the Court that no preference over other Montana creditors was given them.

No evidence was submitted other than as contained in the petition for Leave to Levy filed by Petitioners, but it was stated to the Court that the judgment obtained by the Petitioners against Federal Surety Company on the 20th day of May, 1932, was made without knowledge of the receivership proceedings in Iowa; that so far as the local Receiver was concerned, D. A. Crichton, they felt that no jurisdiction had been obtained whereby he could make any claim to the money sought to be levied upon and moreover that he had not, as yet, done so; that the action in making levy was valid and unimpeachable but that in order to save any argument, concerning the matter, it was desired to have the leave of Court requested.

It was further suggested that the said Petitioners claimed and desired to have a lien in any event prior to the assertion of any claim by E. W. Clark, and that, in the event the Order of the Court of May 24th, 1932, refusing to vacate the Order appointing Receiver should be reversed, such would be the result; that so far as local creditors were concerned, Petitioners recognized their right under the decisions to participate in the Montana assets of Federal Surety Company, but subject to any priority gained in the manner recognized by law. It was agreed by counsel for plaintiff and D. A. Crichton, and counsel for said petitioners that there were ample assets in Montana to pay all Montana creditors in full. At said time counsel for plaintiff stated that he did not consent to the order requested because he did not wish to prejudice D. A. Crichton's rights as Receiver.

Said Order was in the words and figures as follows, to-wit:

[fol. 14] ORDER GRANTING PETITION TO LEVY EXECUTION—
Filed May 24, 1932

The duly verified petition for Harry O. Williard, C. W. Hay and W. W. Wheaton, as Trustee of the Gordon Campbell Kevin Syndicate, a common law trust, being presented to the Court, and Counsel being heard on said petition, and it appearing to the Court that the relief prayed for in said petition should be granted,

Now, therefore, it is ordered that the said petitioners, Harry O. Williard, C. W. Hay and W. W. Wheaton, as Trus-

tees of the Gordon Campbell Kevin Syndicate, a common law trust, be and they are hereby granted permission to levy executions issued upon judgments heretofore obtained by said petitioners against the Federal Surety Company, as set forth in their petition herein; and said executions may be levied upon any property of the defendant Federal Surety Company within the State of Montana notwithstanding the Order of this Court made in the above entitled action on or about the 26th day of March, 1932, appointing a Receiver herein.

Done in Open Court this 24th day of May, 1932.

H. H. Ewing, Judge.

That thereafter, on the 25th day of July, 1932, the said Receiver, D. A. Crichton, filed in said cause his Petition for annulment of the said Order, last above set forth, in the words and figures as follows, to-wit:

NOTICE OF MOTION FOR ANNULMENT OF ORDER—Filed July 25, 1932

To Harry O. Williard, C. W. Hay, and W. W. Wheaton, as trustees of the Gordon Campbell-Kevin Syndicate, a common-law trust, and to Louis P. Donovan and Belden & DeKalb, attorneys:

You and Each of you will please take notice that D. A. Crichton, receiver of the Federal Surety Company of Davenport, Iowa, a corporation, will call on for hearing the petition filed by him for the setting aside the order permitting the levy of executions heretofore made by the above entitled Court on the 24th day of May, 1932; said hearing [fol. 15] to be held in the Court room of the Court House in the City of Great Falls, Cascade County, State of Montana, on the 3rd day of August, 1932.

Molumby, Busha & Greenan, Attorneys for D. A. Crichton, Receiver of the Federal Surety Company of Davenport, Iowa, a Corporation.

That concurrently therewith, the said D. A. Crichton gave notice on said July 25th, 1932, that the same would be brought on for hearing on the 3rd day of August, 1932, all of which were duly served on the attorneys for the said

Harry O. Williard, C. W. Hay and W. W. Wheaton, as Trustees of the Gordon Campbell Kevin Syndicate, and that thereafter, the said Petition came on regularly for hearing on the 3rd day of August, 1932, and the following proceedings were had, to-wit:

Said Petitioners, Harry O. Williard, W. W. Wheaton and C. W. Hay, appeared by and through their attorneys, Belden & DeKalb, and the Plaintiff by and through his attorneys, Molumby, Busha & Greenan, and E. W. Clark, Defendant, by and through his attorneys, Gunn, Rasch, Hall & Gunn, whereupon counsel for said Williard, Wheaton and Hay resisted the said Motion, last above set forth, and called to the attention of the Court that there was no ground of Motion stated, and asked to be enlightened as to the ground of Motion, whereupon, it was stated that the ground of Motion was that the Order of May 24th, above set forth, granting the right to said Williard, Wheaton and Hay to levy executions, was void and the said Motion was argued to the Court and submitted for decision;

That on the 3rd day of August, 1932, the Defendant, E. W. Clark, duly served and filed herein his Answer and Cross-Petition in the words and figures as follows, to-wit:

ANSWER AND CROSS-PETITION OF E. W. CLARK, AS RECEIVER AND/OR LIQUIDATING OFFICER OF FEDERAL SURETY COMPANY OF DAVENPORT, IOWA—Filed Aug. 3, 1932

Comes now the defendant, E. W. Clark, as Receiver and/or Liquidating Officer of the Federal Surety Company of Davenport, Iowa, and for his answer to the Complaint on file in the above entitled cause:

[fol. 16]

I

Admits the allegations of paragraphs one and two of said complaint.

II

Admits the allegations of paragraphs three and four of said complaint, except the allegation that the judgment therein referred to was duly given and made and in this connection alleges that prior to the giving and entry of said judgment, to-wit; on September 25th, 1931, the Federal Surety Company of Davenport, Iowa, was dissolved, as alleged in paragraph six of said complaint.

III

Admits the allegations of paragraphs five, six and seven of said complaint.

IV

Admits the allegations of paragraphs eight, except that the sum in the hands of the Industrial Accident Commission of Montana is about $19,200.00, and that the money in the custody of the law in the State of Montana is about $8,500.00; also excepting the allegation that the assets in the State of Montana would be dissipated and lost to the creditors if turned over to this defendant as Receiver.

V

Admits the allegations of paragraphs nine, ten and eleven of said complaint.

For a further answer and by way of Cross-petition, E. W. Clark, as receiver of said Federal Surety Company, respectfully shows to this Court and alleges:

That he is the duly appointed, qualified and acting Commissioner of the Insurance Department of the State of Iowa. That, as more fully hereinafter appears, he is the duly appointed, qualified and acting Receiver of the Defendant, Federal Surety Company, of Davenport, Iowa, pursuant to order of the District Court of the State of Iowa, in and for Scott County.

That Federal Surety Company, of Davenport, Iowa, was a corporation organized and existing under and by virtue [fol. 17] of Chapter 404 of the Code of Iowa, 1927, with its principal place of business in the City of Davenport, County of Scott, State of Iowa.

That on the 11th day of September, 1931, the State of Iowa, acting through its Attorney General, John Fletcher, filed in the District Court of the State of Iowa, a court of general jurisdiction, a petition alleging that the assets and funds of the Defendant Company, Federal Surety Company, are reduced and impaired, and that in the interest of the public a temporary receiver should be appointed for said Company. That on said date, to-wit, the 11th day of September, 1931, an order was entered by said Court appointing E. W. Clark, Commissioner of the Insurance Department of the State of Iowa, as temporary receiver of said Federal Surety Company.

That on the 21st day of September, 1931, the State of Iowa, acting through its Attorney General, John Fletcher, filed in said Court an amendment to said petition, alleging that the assets and funds of the Defendant Company, Federal Surety Company, of Davenport, Iowa, are reduced and impaired by its liabilities, so that most of its capital has been and is dissipated, and that the Commissioner of Insurance of the State of Iowa has advised the Attorney General that the condition of the affairs of the Defendant Company are such that it has no cash on hand with which to pay its losses and claims in the ordinary course of business, and that the further continuance of the business of the Company would not be for the best interest of the public, and alleging further that an order should be entered requiring the Defendant Company to show cause why its business should not be forthwith dissolved and a Receiver appointed to wind up its affairs.

On the same day, to-wit, the 21st day of September, 1931, the said Court entered an order directing Federal Surety Company to show cause on the 25th day of September, 1931, why its business should not be forthwith dissolved and a Receiver appointed to wind up its affairs.

Thereafter, and on the 25th day of September, 1931, and at the time specified for such showing, and after notice to said Federal Surety Company of said order, an order was entered by said Court finding said Federal Surety Company, of Davenport, Iowa, in default for want of appear-
[fol. 18] ance pursuant to said order, finding that the assets of said Defendant are in such shape that the Company is unable to meet its current losses and obligations, and that there is grave danger of loss and dissipation of said assets, and that the interest of the public requires that said Defendant, Federal Surety Company, of Davenport, Iowa, be dissolved, its effects distributed, and that a Receiver should be appointed to take charge of and wind up its affairs and further decreeing a dissolution of the Defendant Corporation, and a distribution of its effects. Said order thereupon appointed the undersigned, E. W. Clark, as Receiver for said Defendant, Federal Surety Company, of Davenport, Iowa, and granted to the said Receiver power and authority to do all things necessary to dissolve the business of said corporation and distribute its assets among the creditors thereof all as more fully appears in a certified copy of said decree, hereinafter referred to.

Thereafter, and on the 25th day of September, 1931, the undersigned, qualified as such Receiver by filing his oath, as required by the laws of the State of Iowa, and a bond as prescribed in said Order of appointment, and thereupon the said Court, acting through its Clerk, issued to the undersigned letters of Receivership.

That on the 22nd day of December, 1931, the said Court, in said action in the State of Iowa, made a further order and decree in said cause. That a duly exemplified copy of said decree of said court, made and entered on September 25, 1931, and of said letters of receivership issued to said E. W. Clark, and of said further order and decree of December 22, 1931, are hereto attached, and marked Exhibits "A", "B" and "C", and made a part of this petition.

That all said proceedings were taken pursuant to the laws of the State of Iowa, including Section 8964 of the Codes of Iowa, 1927, which was in effect at the time of said proceedings, and which appears in words and figures as follows:

"The commissioner of insurance shall, when he finds it expedient, appoint one or more persons, not officers, agents or stockholders of any insurance company doing business in the State, to examine into the affairs and condition of any such company incorporated or doing business therein, or make such examination himself, and the officers or agents thereof shall produce their books for the inspection [fol. 19] of the examiners and otherwise assist therein, so far as they can do so; and in conducting the investigation they may examine under oath the officers or agents of any company, or others, relative to the business and condition of the company, and the result thereof shall be published in one or more papers in the state, when the commissioner believes the public interest requires it. When it appears to the commissioner from such examination that the assets and funds of any company incorporated in this state are reduced or impaired by its liabilities, as defined under the head of liabilities in the statement required by this chapter, more than twenty per cent below the paid-up capital stock required, he shall direct the officers thereof to require the stockholders to pay in the amount of such deficiency within such a period as he may designate in such requisition, or he shall communicate the fact to the attorney general, who shall apply to the district court, or if in

vacation to one of the judges thereof, for an order requiring the company to show cause why its business shall not be dissolved. The court or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it appears to its or his satisfaction that the assets and funds of said company are not sufficient, as aforesaid, or that the interest of the public requires it, it or he shall decree a dissolution of said company, and a distribution of its effects, and appoint a receiver therefor. The application of the attorney general may be by the court or judge sent to a referee to inquire into and report upon the facts stated therein, which report shall be made to the court or judge."

and Chapter 233 of the Acts of the 43rd General Assembly of the State of Iowa, which was in effect at the time of said proceedings, and which appears in words and figures as follows:

"Section 1. The Commissioner of Insurance henceforth shall be the receiver and/or liquidating officer for any insurance company, association or insurance carrier, and shall serve without compensation other than his stated compensation as commissioner of insurance, but he shall be allowed clerical and other expenses necessary for the conduct of such receivership.

[fol. 20] "Section 2. All expenses of supervision and liquidation shall be fixed by the commissioner of insurance, subject to approval by the court or a judge thereof, and shall upon his order, be paid out of the funds of such company, association or insurance carrier in his hands."

That by virtue of the facts hereinbefore alleged, E. W. Clark is the duly appointed, qualified and acting Receiver and/or Liquidating Officer of the Defendant, Federal Surety Company, of Davenport, Iowa.

That creditors and policyholders of said Federal Surety Company, of Davenport, Iowa, reside in different jurisdictions, including this jurisdiction.

That the assets of said Federal Surety Company are located in different jurisdictions, including this jurisdiction.

That within this jurisdiction this Petitioner is informed and believes that there are assets of said Federal Surety Company, consisting of accounts, notes, claims, securities,

furniture, and fixtures, and other personal property, worth the sum of Fifty Thousand Dollars.

That your petitioner is informed and believes that certain creditors are threatening suits against said property, and that attachments have been issued since September 25, 1931, and are about to be issued, or may be issued, against said property, as there are considerable outstanding and past due obligations, and if such suits and attachments are issued or those now commenced are prosecuted, the creditors of this estate, as well as your petitioner, will sustain an irreparable damage and loss by reason of Court costs, and the damage incident to such interference with the property of the Defendant. That for the orderly administration of this estate, and to avoid preferential treatment of one policy-holder over another, and of one creditor over another, and that all policy-holders and creditors of the Defendant may share alike in the distribution of the assets of said Company, an ancillary receiver should be appointed by this Court.

Wherefore your petitioner prays for an order of this Court confirming the title in him to the assets and property of said Federal Surety Company, and confirming the appointment of D. A. Crichton, as an Ancillary Receiver of all of the property, assets and effects of the above-named [fol. 21] defendant, Federal Surety Company, of Davenport, Iowa, situated within this jurisdiction, to care for and preserve the same until the further order of this Court, and with all rights and powers usually granted to ancillary receivers in such cases, including the right and power to carry into force and effect the order of the original Court or jurisdiction.

Petitioner further prays for an order of this Court directing the agents, employees and all other persons, including creditors, to deliver into the possession of the ancillary receiver, so appointed, and confirmed all the property of the said defendant, Federal Surety Company, and otherwise to comply with the terms of said order; and that the defendants, its agents, servants and attorneys, and all persons, firms and corporations, be restrained and enjoined from in any way interfering with the possession of said property, other than to turn the same over to the said ancillary receiver.

Petitioner states that D. A. Crichton is a proper person to act as Ancillary Receiver by appointment in this Court,

and asks that his appointment be confirmed as Ancillary Receiver.

E. W. Clark, Receiver of Federal Surety Company, by Cook & Balluff, Gunn, Rasch, Hall & Gunn, Attorneys for E. W. Clark, Receiver for Federal Surety Company.

(Duly verified.)

EXHIBIT "A" TO ANSWER AND CROSS-PETITION

IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR SCOTT COUNTY

In Equity. No. 28238

STATE OF IOWA EX REL, JOHN FLETCHER, Attorney General, Plaintiff,

vs.

FEDERAL SURETY COMPANY OF DAVENPORT, IOWA, Defendant

Decree and Order Appointing Receiver

Now, on this 25th day of September, A. D. 1931, being a day of the September 1931 Term of said Court, this mat- [fol. 22] ter comes on for final hearing, upon the appl-cation of the State of Iowa, through its Attorney General, for the appointment of a Receiver for the above named Company, Plaintiff's proofs of service of notice upon the defendant are thereupon submitted and the Court finds that on the 21st day of September, A. D. 1931, this Court entered an Order requiring the defendant to appear on the 25th day of September, A. D. 1931, at two o'clock P. M., and show cause why its affairs and business should not be dissolved and a Receiver appointed to wind up its affairs and to distribute all of its effect- as by law provided. The Court further finds that a certified copy of said order was duly and properly served upon the said defendant as provided in said order.

The Plaintiff, State of Iowa, appears now by its Attorney General, John Fletcher, and Assistant Attorney General, Carl J. Stephens, and the defendant appears not, and its default is hereby entered against it.

Trial is thereupon had to the Court, and the Court having examined the evidence submitted by plaintiff, and being fully advised in the premises, finds:

That the said Federal Surety Company is a corporation organized and existing under Chapter 404 of the Insurance Laws of the State of Iowa.

The Court further finds that the assets of the said defendant are in such shape that said Company is unable to meet its current losses and obligations, and that there is grave danger of the loss and dissipation of said assets, and that the interest of the public requires that said Defendant, Federal Surety Company, be dissolved, its effects distributed, and that a Receiver be appointed to take charge of and wind up its affairs.

Wherefore it is finally ordered, adjudged and decreed:

(1) That under and in accordance with the provisions of Section 8964 of the Code of 1927 of the State of Iowa the defendant, Federal Surety Company, shall be dissolved and its effects distributed.

(2) That E. W. Clark, Commissioner of Insurance of the State of Iowa, be and he is hereby appointed permanent Receiver of said defendant company in accordance with the provisions of Chapter 233, Acts of the Forty-third General Assembly of the State of Iowa, with authority and [fol. 23] direction to take charge of and manage the property, assets and business of the defendant, with full power to sue for, collect, receive and take into his possession the goods, chattels, rights, credits, monies, books, papers, property and assets of every description and wheresoever situated, of the defendant, and to do any and all acts and things which may be necessary, proper or advisable to preserve the property, assets, rights and privileges of the defendant, and with all the incidental powers ordinarily vested in receivers in like cases. and that the Union Savings Bank and Trust Company, of Davenport, Iowa, is hereby designated as the depository of all money and funds coming into the hands of the Receiver.

(3) That said Receiver shall, as soon as it may be practicable, file an inventory of all property of every description which shall have come into his possession as such Receiver.

(4) That said Receiver proceed to wind up the business of the defendant, and to that end all creditors, including all

lien and unsecured creditors of the defendant, and all claimants to specific properties in the hands of the Receiver, be and they hereby are ordered to file proof of their claims with the Receiver on or before the first day of April, 1932. Every proof of claim shall be itemized and sworn to and shall state with particularity the nature and the origin of the claim so asserted, the actual consideration therefor when the same has become or will become due, whether any and what securities are held, whether any and what payments have been made thereon, that the sum claimed is justly due defendant, and that the claimant has not, nor has any other person for his use, received any security or satisfaction whatever other than by him set forth.

(5) That said Receiver shall within ninety (90) days from this date give a notice to creditors of the defendant advising them with respect to filing of claims, the powers of the Receiver with respect thereto, as herein set forth, and the time within which all claims shall be filed by United States Mail, addressed to the last known address of all creditors as shown by the books of the Company, and in addition thereto the Receiver shall cause a similar notice to be published in at least one (1) newspaper of general circulation in the City of Davenport, Iowa, once each week [fol. 24] for two (2) consecutive weeks, the first publication thereof to be not later than the 31st day of October, 1931.

(6) That the said Receiver is authorized to examine the claims so filed, as heretofore provided, and to make his findings thereon, allowing or disallowing, in whole or in part, each and all of said claims, and to file in this cause, as soon as possible after the time for filing claims has expired, a written report setting forth for the confirmation of this Court the results of such findings, subject to the right of any claimants to object to any findings so made, such objection to be filed in writing in this cause at such time as the Court may hereafter prescribe.

(7) In the event that any creditor or creditors shall not so present or file their claims with the Receiver aforesaid on or before the first day of April, 1932, it is hereby ordered that they shall be debarred from participating in any dividend or distribution that may hereafter be made in these proceedings, or from any interest in and to the properties of the defendant, Federal Surety Company, administered

by the Receiver, or any proceeds derived from the sale or other disposition thereof.

(8) That the Receiver is authorized and directed that in the event it approves any priorities or liens upon any of the properties administered by him, he have such properties appraised by two (2) competent appraisers whom he shall select, who shall report to this Court not less than five (5) days preceding the date fixed for the sale of the properties of the defendant company, as hereafter set out, their findings with respect to the values of the properties subject to such priorities or liens.

(9) That the Receiver shall, in addition to the appraisement of the properties, provided for in No. 8 thereof cause all of the assets and property of the defendant, except cash money, to be appraised by two (2) competent appraisers whom the Receiver shall select, who shall report to this Court not less than five (5) days preceding the date fixed for the sale of the properties of defendant company, as hereafter set out, their findings with respect to the value of the property and assets appraised by them.

(10) That the Receiver is further authorized and directed to sell all the property and assets except money, [fol. 25] whether real, personal or mixed, tangible or intangible, of the defendant, Federal Surety Company, at Receiver's sale, free and clear of all liens and incumbrances, but subject, however, to the expenses of the receivership, allocated between the different lots or parcels in accordance with the appraised value thereof. Such sale shall be at public auction for cash to the highest bidder and shall be made as an entirety or in such lots or parcels as the Receiver may determine upon and the Court approve, and as will protect any liens or priorities, reserving to the holder of any such liens or priorities, the right to bid in any of the property so sold, and, for the purpose of making settlement or payment thereof, to use and apply his securities in order that there may be credited thereon the sum or sums apportionable and applicable thereto out of the net proceeds of such sale.

(11) That the Receiver shall give notice of such sale by publishing a notice thereof in at least two (2) newspapers of general circulation in Scott County, Iowa, once each week

for four (4) consecutive weeks, the last publication thereof being at least ten (10) days before the date fixed for such sale.

(12) That no sale by the Receiver of the properties of defendant company shall be valid until the Receiver shall make report thereof and file such report with the Clerk of this Court and present such report for approval and confirmation to some Judge of this Court.

(13) That the Receiver is hereby authorized to employ such counsel as he shall deem necessary to advise him in the performance of his official duties, and that he shall have leave to employ such agents and employees as may be necessary to enable him properly to perform his duties, including the employment of auditors for the purpose of an examination of the books and records of the defendant company and making an itemized and detailed report thereof to the Receiver.

(14) That the said E. W. Clark shall, before entering upon his duties herein, take an oath and file a bond in this Court as Receiver, which bond shall be in the sum of One Hundred Thousand ($100,000.00) Dollars, with sureties to be approved by the Clerk of this Court, conditioned that the [fol. 26] said Receiver shall well and truly perform the duties of his office; whereupon, letters of receivership shall issue to him.

(15) That the aforesaid E. W. Clark was heretofore appointed temporary Receiver of Federal Surety Company in this action. It is ordered that said E. W. Clark shall with all reasonable speed file this report as temporary Receiver with this Court, and upon approval thereof he shall stand discharged as temporary Receiver.

(16) Said Receiver or any other party in interest is hereby given leave to apply to the Court at any time for any other or further directions, orders or decrees as may be necessary or proper, and the Court retains jurisdiction of this cause for this purpose.

(Sgd.) W. R. Maines, Judge.

EXHIBIT "B" TO ANSWER AND CROSS-PETITION

IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR SCOTT COUNTY

In Equity. No. 28238

STATE OF IOWA ex Rel. JOHN FLETCHER, Attorney General, Plaintiff,

vs.

FEDERAL SURETY COMPANY OF DAVENPORT, IOWA, Defendant

Order as to Suits and Contracts to Which Federal Surety Company Was or Is Alleged to be a Party

Be it remembered that on this 22nd day of December, 1931, there came on for hearing before the Court the application of the Receiver appointed by this Court in the above entitled cause for instructions and orders concerning his duty as to contracts, including insurance policies and surety bonds, to which Federal Surety Company was a party, and as to suits in which Federal Surety Company is named as defendant, some of which were pending September 25, 1931, and some of which purport to have been commenced thereafter, and some in which state officers purport [fol. 27] to hold property of Federal Surety Company pursuant to levies of writs of attachment.

The Court, having considered the same, and being fully advised in the premises, now finds, determines and adjudges:

That Federal Surety Company was incorporated and existed as a corporation under and by virtue of the laws of the State of Iowa.

That this action was commenced by the State of Iowa, acting through its Attorney General, and the Order and Decree of this Court was entered herein September 25, 1931, all pursuant to Section 8402 of the Code of Iowa of 1927 and of 1931, being Section 1640 of the Code of Iowa of 1897, which provides as follows:

"Courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, and to appoint a receiver therefor, who shall be a resident of the State of Iowa. An action therefor may be

instituted by the attorney general in the name of the state, reserving, however, to the stockholders and creditors all rights now possessed by them."

and Section 8964 of the Code of Iowa of 1927 and of the Code of 1931, being Section 1731 of the Code of 1897, which provides — follows:

"The commissioner of insurance shall, when he finds it expedient, appoint one or more persons, not officers, agents, or stockholders of any insurance company doing business in the state, to examine into the affairs and condition of any such company incorporated or doing business therein or make such examination himself, and the officers or agents thereof shall produce their books for the inspection of the examiners and otherwise assist therein, so far as they can do so; and in conducting the investigation they may examine under oath the officers or agents of any company, or others, relative to the business and condition of the company, and the result thereof shall be published in one or more papers in the state, when the commissioner believes the public interest requires it. When it appears to the commissioner from such examination that the assets and funds of any company incorporated in this state are reduced or impaired by its liabilities, as defined under the head of liabilities in the statement required by this chapter, more [fol. 28] than twenty per cent below the paid-up capital stock required, he shall direct the officers thereof to require the stockholders to pay in the amount of such deficiency within such a period as he may designate in such requisition, or he shall communicate the fact to the attorney general, who shall apply to the district court, or if in vacation to one of the judges thereof, for an order requiring the company to show cause why its business shall not be dissolved. The court or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it appears to its or his satisfaction that the assets and funds of said company are not sufficient, as aforesaid, or that the interest of the public requires it, or he shall decree a dissolution of said company and a distribution of its effects, and appoint a receiver therefor. The application of the attorney general may be by the court or judge sent to a referee to inquire into and report upon the facts stated therein, which report shall be made to the court or judge."

and Section 8613-c1 of the Code of Iowa of 1931, being Chapter 233 of the Acts of the 43rd General Assembly of Iowa, which provides as follows:

"The commissioner of insurance henceforth shall be the receiver and/or liquidating officer for any insurance company, association or insurance carrier, and shall serve without compensation other than his stated compensation as commissioner of insurance, but he shall be allowed clerical and other expenses necessary for the conduct of such receivership."

That this Court, as a court of equity, constituted by Sections 5 and 6 of the Constitution of the State of Iowa, which provides as follows:

"The District Court shall consist of a single Judge, who shall be elected by the qualified electors of the District in which he resides. The Judge of the District Court shall hold his office for the term of four years, and until his successor shall have been elected and qualified; and shall be ineligible to any other office, except that of Judge of the Supreme Court, during the term for which he was elected."

"The District Court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have [fol. 29] jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law."

and by Section 10761 of the Code of Iowa of 1931, which provides as follows:

"The district court shall have general, original, and exclusive jurisdiction of all actions, proceedings, and remedies, both civil and criminal, except in cases where exclusive or concurrent jurisdiction is or may hereafter be conferred upon some other court or tribunal by the constitution and laws of the state, and shall have and exercise all the powers usually possessed and exercised by courts of record."

on September 25, 1931, had and now has jurisdiction of this action and the subject matter thereof.

That pursuant to the power conferred by said sections, pursuant to the allegations set forth in the petition filed therein, as amended, and pursuant to good cause shown

herein, as in said sections provided, this Court did, on September 25, 1931, enter an Order and Decree in this cause, and thereby dissolved Federal Surety Company and terminated its corporate existence, and thereby appointed E. W. Clark, who was and is Commissioner of Insurance of the State of Iowa, as the Receiver and/or liquidating officer, to take title to all property of the dissolved corporation for the purpose of liquidating its affairs and distributing its assets, as by law provided.

That by virtue of the statutes hereinbefore referred to, as construed by the Court of last resort in the State of Iowa, and by virtue of the proceedings in this cause, the said corporation, Federal Surety Company, ceased to exist upon the entry of the Order and Decree herein at 4:30 P. M., Central Standard Time, September 25, 1931, and that thereupon all its agencies ended, its employees, including attorneys, were discharged, and it was put, without exception or notice of appeal, beyond all further corporate activity, its existence was put to an end for all purposes whatsoever, so that it can neither make nor take contracts, nor sue or be sued, and so that all debts to or from it became extinguished and all actions by or against [fol. 30] it abated, and so that as after death of a natural person, it can have no interest in the property theretofore by it controlled.

That in any action pending wherein Federal Surety Company is named as a defendant, Federal Surety Company is not now, and since September 25, 1931, has not been a party defendant, so that a judgment rendered therein is or will, upon rendition, be a nullity, not binding upon the Receiver appointed herein. That a lien on property owned September 25, 1931, by Federal Surety Company, asserted by virtue of the levy of a writ of attachment in such a cause, cannot be perfected without the entry of a final judgment in such cause against Federal Surety Company; that there can be no judgment or execution against Federal Surety Company, or property owned by it September 25, 1931; and that claimants so asserting liens are, and since September 25, 1931, have been without remedy for the enforcement thereof.

It is, therefore, ordered, adjudged, and decreed:

(1) That the defendant, Federal Surety Company, is, and since September 25, 1931, has been dissolved, and that

its corporate existence is terminated, with the results hereinbefore determined.

(2) That E. W. Clark, receiver and/or liquidating officer of Federal Surety Company, is the successor to said corporation and as such holds title to all property owned by Federal Surety Company at the time it so ceased to exist.

(3) That E. W. Clark, receiver and/or liquidating officer, be and he is hereby directed to refrain from entering a general appearance on behalf of Federal Surety Company to conduct a defense on the merits in any action wherein Federal Surety Company is named as a defendant.

(4) That E. W. Clark, receiver and/or liquidating officer, be and he is hereby given leave in his discretion to appear specially, or as may be necessary, in any action wherein Federal Surety Company is named as defendant, for the purpose of presenting a plea in abatement, motion to dismiss, or motion to quash or dissolve any summons or writ of attachment, and any levy attempted thereunder, and/or other writ, process, garnishment or seizure of property.

(5) That a person asserting a claim against Federal Surety Company shall share in the assets distributed by [fol. 31] the Receiver only to the extent that his claim is allowed by this Court, either upon recommendation to the Court or after proof, and that in passing upon and determining the validity of claims presented, judgments purporting to have been rendered against Federal Surety Company after September 25, 1931, be disregarded, and that a lien asserted by virtue of attachment or other process in any cause wherein judgment was not rendered prior to September 25, 1931, be disregarded in determining the rights of the claimant asserting the same.

(6) That all policies of insurance, contracts of reinsurance, and surety bonds in effect September 25, 1931, including the policies of insurance and surety bonds wherein Federal Surety Company appeared as principal, surety, insurer, insured, reinsurer or reinsured, were cancelled and terminated upon entry in this cause of the order of dissolution of Federal Surety Company at 4:30 P. M., Central Standard Time, September 25, 1931.

W. R. Maines, Judge.

EXHIBIT "C" TO ANSWER AND CROSS-PETITION

IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR SCOTT COUNTY

Equity. No.28238

STATE OF IOWA ex Rel. JOHN FLETCHER, Attorney General, Plaintiff,

vs.

FEDERAL SURETY COMPANY OF DAVENPORT, IOWA, Defendant

Letters of Receivership Issued to E. W. Clark, of Des Moines, Iowa

STATE OF IOWA,
Scott County, ss:

To all to whom these presents shall come, Greeting:

Whereas, on the 25th day of September, A. D. 1931, the District Court of Iowa for Scott County, in a certain cause then pending and numbered 28238 and entitled State of [fol. 32] Iowa, ex rel. John Fletcher, Attorney General, Plaintiff, vs. Federal Surety Company of Davenport, Iowa, Defendant, did on application of the plaintiff in said suit enter an Order appointing E. W. Clark of Des Moines, Iowa, as Receiver; and

Whereas, said E. W. Clark of Des Moines, Iowa, has entered into bond for the faithful performance of his duty and has filed the oath prescribed by law.

Now, therefore, know ye and all whom it may concern that said E. W. Clark of Des Moines, Iowa, has been appointed Receiver in the above entitled action with full power to demand, sue for and take possession of all money and property belonging to the defendant, Federal Surety Company, and in general to do all other acts which may be required of said Receiver by law or the Order of the Court.

In testimony whereof I have hereunto set my hand and affixed the seal of the District Court of said County at Davenport, this 25th day of September, A. D. 1931.

Emil F. Schroder, Clerk of the District Court, by Olive S. Clements, Deputy. (Seal.)

Certificate of Judge and Clerk

IN THE DISTRICT COURT OF IOWA IN AND FOR SCOTT COUNTY, STATE OF IOWA

SCOTT COUNTY, ss.

I, Emil, F. Schroder, Clerk of the District Court of the State of Iowa, in and for said County, do hereby certify that the foregoing is a true, compared and perfect transcript of the following described instruments in the matter of State of Iowa, Ex Rel. John Fletcher, Attorney General, Plaintiff vs. Federal Surety Company of Davenport, Iowa, Defendant, being Equity cause No. 28238 of the causes pending in my office, all of which instruments were filed in my office on the several dates noted below, to-wit:

(1) Decree and Order dissolving Federal Surety Company of Davenport, Iowa, and appointing E. W. Clark permanent receiver, entered September 25, 1931;

(2) Letters of Receivership issued September 25, 1931, to E. W. Clark;

[fol. 33] (3) Order as to suits and contracts to which Federal Surety Company was or is alleged to be a party, entered December 22, 1931.

I further certify that on the date of this certificate the said E. W. Clark is the duly appointed, qualified and acting Receiver of Federal Surety Company.

In witness whereof I have hereunto set my hand and affixed the seal of said Court at my office in Davenport in said County this 8 day of June, 1932.

Emil F. Schroder, Clerk of the District Court of the State of Iowa in and for Scott County. (Seal.)

STATE OF IOWA,
Scott County, ss:

I. W. R. Maines, one of the Judges of the District Court of the State of Iowa, in and for the Seventh Judicial District of said State, composed of the Counties of Scott, Clinton, Muscatine and Jackson, do hereby certify that Emil F. Schroder, who has given the preceding certificate, was, at the time of so doing, the Clerk of the District Court of the state of Iowa, in and for Scott County, in said District,

duly qualified as such, that he is the proper custodian of the records of said Court, and the proper officer to give such certificate, and that the same is in due form of law.

Witness my hand at Davenport, Iowa, this 8 day of June, A. D. 1932.

W. R. Maines, Judge District Court, Seventh Judicial District.

STATE OF IOWA,
Scott County, ss:

I, Emil F. Schroder, Clerk of the District Court of the State of Iowa, in and for said County, do hereby certify that the Honorable W. R. Maines, who has given the preceding certificate, was, at the time of so doing, one of the Judges of the District Court of the Seventh Judicial District of the State of Iowa, duly commissioned and sworn, to all whose acts as such, full faith and credit are and ought to be given.

[Vol. 34] In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Davenport, in said County, this 8th day of June, A. D. 1932.

Emil F. Schroder, Clerk District Court. (Seal.)

That on the 3rd day of August, 1932, the Plaintiff filed herein his admission of the allegations of the Answer and Cross-Petition of E. W. Clark, in the words and figures as follows, to-wit:

ADMISSION OF ALLEGATIONS IN ANSWER AND CROSS-PETITION —Filed Aug. 3, 1932

Comes now the plaintiff in the above entitled action, and through his counsel of record admits each and every affirmative allegation, fact and thing contained in the Answer and Cross Petition of E. W. Clark, as Receiver and/or Liquidating Officer of Federal Surety Company of Davenport, Iowa, and joins in the prayer of said petition, and consents to the granting of the same.

Molumby, Busha & Greenan, Attorneys for the Plaintiff.

That thereafter, on the 25th day of August, 1932, out of the presence of said Williard, Wheaton and Hay, and of their attorneys, and without their knowledge, the Court made and entered an Order Confirming the Appointment of Receiver in the words and figures as follows, to-wit:

ORDER CONFIRMING APPOINTMENT OF RECEIVER AND DECREE —Filed Aug. 25, 1932

Be it remembered that on the 2nd day of Aug., 1932, the above entitled matter came on for hearing before the Court, upon the plaintiff's Petition and the answer and Cross-Petition of E. W. Clark as Receiver and/or Liquidating Officer of Federal Surety Company, asking for confirmation of his title to certain assets and for confirmation of the appointment of D. A. Crichton as Receiver herein and a determination of the relative rights and powers of the said Clark and the said Crichton; E. W. Clark, Receiver and/or Liquidating Officer, appearing by Cook & Balluff, [fol. 35] and Gunn, Rasch, Hall & Gunn, his attorneys, and the Plaintiff and D. A. Crichton appearing in person and by their attorneys, Molumby, Busha & Greenan.

The Court, being fully advised in the premises, finds:

That Federal Surety Company was organized and existed as a corporation under and by virtue of the laws of the State of Iowa relating to insurance companies. That pursuant to the statutes of the State of Iowa an action in equity was commenced by the Attorney General of the State of Iowa as plaintiff and against Federal Surety Company as defendant. That in that action, and after notice to Federal Surety Company, an order and decree of said Court was entered on September 25, 1931, dissolving Federal Surety Company and appointing E. W. Clark, Commissioner of the Department of Insurance of the State of Iowa, as Receiver and/or liquidating Officer of the dissolved Federal Surety Company and directing him as such to liquidate the assets of said Federal Surety Company and to distribute the same among the creditors of Federal Surety Company whose claims are determined as in said order provided. That the said Clark qualified and is now the duly appointed, qualified and acting Receiver and/or liquidating officer of the dissolved corporation, Federal Surety Company.

That thereupon the corporate existence of Federal Surety Company terminated and title to all property thereto-

fore owned by it passed to the Commissioner of the Department of Insurance of the State of Iowa in his capacity as Receiver and/or liquidating officer as aforesaid.

That the assets owned by the former Federal Surety Company, wherever situated, should be liquidated and distributed ratably to all persons having claims against Federal Surety Company, subject to any liens and rights of creditors acquired on or prior to September 25, 1931, in or to specific property.

That this Court has and should assert jurisdiction of all property owned by Federal Surety Company, title to which passed to E. W. Clark, Receiver and/or liquidating officer as aforesaid, and situated in the State of Montana for the purposes, among other things of (1) determining the extent of liens or other rights acquired in or to such property prior to the dissolution of Federal Surety Company as aforesaid; (2) assuring to residents of Montana a distribution out of the assets owned by Federal Surety Company ratably with [fol. 36] all creditors of Federal Surety Company wherever situated; (3) assisting said Receiver and/or Liquidating officer with and facilitating the liquidation of assets owned by Federal Surety Company under orders of the Iowa Court. It is, therefore, determined, ordered, adjudged and decreed as follows:

(1) The appointment and qualification of D. A. Crichton as Receiver of the rights, claims and property owned by Federal Surety Company on September 25, 1931, and now owned by Clark, Receiver, as aforesaid, and situated in the State of Montana, be and it is hereby confirmed, and that as such Receiver he proceed with the liquidation of such assets and with the determination of claims all as provided in this decree.

(2) All persons, firms and corporations domiciled or resident within the State of Montana asserting claims against Federal Surety Company including those claiming liens or other rights in or to specific property, are ordered to file proof of their claims with the Clerk of this Court on or before the 18th day of December, 1932. Every proof of claim so filed shall be itemized and sworn to, and shall state with particularity the nature and origin of the claim so asserted, the actual consideration therefor, when the same has become or will become due, whether any and what se-

curity is held therefor, whether any and what payments have been made thereon, whether Federal Surety Company was indebted for the amount claimed as surety or principal, that the sum claimed is justly due from said Federal Surety Company, and that the claimant has not, nor has any person for the claimant's use, received any security or satisfaction on account of said claim, except as therein set forth.

(3) The Receiver shall forthwith cause to be published in a newspaper of general circulation in the City of Great Falls, Montana, once each week, for three (3) consecutive weeks, a notice to all persons, firms or corporations resident in the State of Montana having claims against Federal Surety Company, advising them with respect to filing of claims, the powers of the Receiver with respect thereto, as herein provided, and the time as herein provided within which all claims shall be filed.

[fol. 37] (4) Said Receiver is authorized to examine the claims so filed and to make findings thereon, allowing or disallowing, in whole or in part, each and all of said claims, and to file in this cause, as soon as possible after the time for filing claims has expired, a written report setting forth, for the confirmation of this Court, the results of such findings, subject to the rights of E. W. Clark, Receiver and/or liquidating officer, as aforesaid, or of any claimant or claimants, to object to any finding so made, such objection to be filed in writing in this cause at such time as the Court may hereafter prescribe.

(5) In the event that any creditor or creditors, or claimant or claimants shall not so present or file their claims on or before the 1st day of December, 1932, it is hereby ordered that they and each of them shall be debarred from participating in any dividend or distribution that may be made in these proceedings, or from any interested in and to the properties administered by the Receiver, or any proceeds derived from a sale or other disposition thereof.

(6) That D. A. Crichton, Receiver, as aforesaid, take possession of and conserve, manage and dispose of, as in this decree provided, all real estate and tangible personal property situated within the State of Montana, title to which was held by Federal Surety Company September 25, 1931, and has passed to E. W. Clark, Receiver and/or liquidating officer, as aforesaid. That the rentals, profits and proceeds

of property so held, managed and disposed of be held and disbursed by the said D. A. Crichton, Receiver, as hereinafter provided.

(7) That D. A. Crichton, Receiver as aforesaid, be and he is hereby directed to assist and cooperate with E. W. Clark, Receiver and/or liquidating officer as aforesaid, in the collection, sale or other disposal of all claims of Federal Surety Company collectible in Montana, whether upon open account, promissory note, or otherwise, and whether unsecured or secured by lien on property situated in Montana; to join E. W. Clark, Receiver and/or liquidating officer as aforesaid, in the execution and delivery of any release, receipt or satisfaction essential to or which will facilitate the collection, sale or other disposal of any such claim determined upon by the said Clark, Receiver and liquidating officer as aforesaid.

[fol. 38] (8) If and when claims allowed by Order of this Court, either upon recommendation of the Receiver or after hearing, are allowed by Order of the District Court of the State of Iowa, in and for Scott County, as claims entitled to share in the assets coming into the hands of the liquidating officer along with other claims of similar rank, D. A. Crichton, Receiver as aforesaid, shall forthwith transfer and remit to E. W. Clark, Receiver and/or Liquidating officer as aforesaid, all money and property in his hands as such Receiver, except so much thereof as has been determined by Order of this Court to be subject to specific liens or rights, and except so much thereof as may be necessary to pay and discharge costs of administration in this proceeding, including the compensation of D. A. Crichton, Receiver and of his attorneys.

(9) In the event that claims allowed and determined in this proceeding are not allowed and determined in such manner as to permit those claimants to share ratably with all other creditors of Federal Surety Company in the assets distributed by E. W. Clark, Receiver and/or liquidating officer as aforesaid, all money and property coming into the hands of D. A. Crichton, Receiver, shall be retained by him for distribution to creditors whose claims are determined in this proceeding, such distribution to be in accordance with orders of this Court to be entered upon applica-

tion then made by the said D. A. Crichton, Receiver, at that time.

(10) E. W. Clark, Receiver and/or liquidating officer, is hereby given leave to intervene at any time in this proceeding as a party in interest, to take such exceptions, make such objections and prosecute the same as would any other party in interest in this proceeding.

(11) D. A. Crichton, Receiver as aforesaid, and any other party in interest in this proceeding, are hereby given leave to apply to this Court at any time for further directions, Orders, or Decree, not inconsistent with this Decree, as may be necessary or proper and the Court retains jurisdiction of this cause to that end.

(12) It is further ordered, adjudged and decreed that the agents, attorneys, employees, and all other persons in the employ of Federal Surety Company, and all other persons, including creditors of said Company, are hereby re- [fol. 39] quired and commanded forthwith to deliver all property and assets of every nature belonging to said Federal Surety Company and situated in the State of Montana to the said D. A. Crichton, Receiver, as aforesaid, and/or the said E. W. Clark, Receiver and/or liquidating officer as aforesaid; and that the Industrial Accident Board of the State of Montana and the Clerk of the District Court of Lewis and Clark County, Montana, are hereby respectively ordered and directed to deliver all assets, bonds or money of the Federal Surety Company in their possession or control, or in the possession or control of either of them, to said D. A. Crichton, Receiver, as aforesaid, and/or the said E. W. Clark, Receiver, and/or liquidating officer, as aforesaid; and it is further ordered that the order of this court heretofore made on May 24th, 1932, in this case, granting permission to Harry O. Williard, C. W. Hay, and W. W. Wheaton, as trustees of the Gordon-Campbell Kevin Syndicate, to levy executions issued upon judgments heretofore obtained by them against the Federal Surety Company be and the same is hereby revoked, annulled and set aside.

It is further ordered, adjudged, and decreed that all former agents, attorneys and employees of said Federal Surety Company, and all creditors of the Federal Surety Company, and generally all persons, firms and corporations

whatsoever are hereby enjoined from interfering with the possession and control by the said Receivers of the property, assets and effects of said Federal Surety Company hereinbefore in this decree referred to.

H. H. Ewing, Judge.

That said Harry O. Williard, W. W. Wheaton and C. W. Hay, as Trustees, as aforesaid, were given notice thereafter of the entry of said Order Confirming Appointment of Receiver and, thereafter, on the 31st day of August, 1932, said Williard, Wheaton and Hay, as Trustees, as aforesaid, served upon all counsel for Plaintiff and Defendant, Clark, their Motion, in the words and figures as follows, to-wit:

MOTION TO VACATE ORDER AND DECREE—Filed Aug. 31, 1932

Come now Harry O. Williard, W. W. Wheaton, and C. W. Hay, as Trustees of Gordon Campbell Kevin Syndicate, a [fol. 40] common law trust, judgment creditors of Federal Surety Company of Davenport, Iowa, having an execution lien upon certain property of the said Federal Surety Company of Davenport, Iowa, situated within the State of Montana, and move this Honorable Court to vacate and annul the order and decree herein given and made on the 25th day of August, 1932, entitled "Order Confirming Appointment of Receiver," upon the following grounds and for the following reasons, to-wit:

(1) That the facts alleged in the Complaint and Cross Complaint in said action are not sufficient to justify the appointment of a Receiver of the property of Federal Surety Company of Davenport, Iowa.

(2) That the court was without jurisdiction to appoint a Receiver in said action.

(3) That said Order, insofar as it directs the said Receiver to collect the property of Federal Surety Company of Davenport, Iowa, and particularly that portion thereof heretofore levied upon under Execution issued out of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, in the case entitled "Harry O. Williard, and others, plaintiffs, vs. Federal Surety Company, defendant," and to transmit the same

out of the jurisdiction of the State of Montana without first paying the Montana creditors of said Federal Surety Company of Davenport, Iowa, is illegal, erroneous and contrary to the public policy of the State of Montana.

This motion will be based upon the records and files in this action, and upon the Affidavit of Harry O. Williard herewith served and filed.

As a separate and distinct Motion, the said Harry O. Williard, W. W. Wheaton, and C. W. Hay, as Trustees of Gordon Campbell Kevin Syndicate, a common law trust, judgment creditors of Federal Surety Company of Davenport, Iowa, situated with the State of Montana, respectfully move the Court that the said order confirming appointment of Receiver made and entered in this action on the 25th day of August, 1932, be modified as follows, to-wit:

(1) By striking from said Order lines 7 to 27 inclusive of page 2 thereof, reading as follows:

[fol. 41] "That thereupon the corporate existence of Federal Surety Company terminated, and title to all property heretofore owned by it passed to the Commissioner of the Department of Insurance of the State of Iowa in his capacity as Receiver and/or liquidating officer as aforesaid.

"That the assets owned by the former Federal Surety Company, wherever situated, should be liquidated and distributed ratably to all persons having claims against Federal Surety Company, subject to any liens and rights of creditors acquired on or prior to September 25, 1931, in or to specific property.

"That this Court has and should assert jurisdiction of all property owned by Federal Surety Company, title to which passed to E. W. Clark, Receiver and/or liquidating officer as aforesaid and situated in the State of Montana for the purposes, among other things of (1) determining the extent of liens or other rights acquired in or to such property prior to the dissolution of Federal Surety Company as aforesaid; (2) assuring to residents of Montana a distribution out of the assets owned by Federal Surety Company wherever situated; (3) assisting said Receiver and/or liquidating officer with and facilitating the liquidation of assets owned by Federal Surety Company under orders of the Iowa court. It is therefore, determined, ordered, adjudged and decreed as follows:"

(2) By striking from said Order Paragraph (6) appearing on Page 4 thereof, reading as follows:

"That D. A. Crichton, Receiver as aforesaid, take possession of and conserve, manage and dispose of, as in this decree provided, all real estate and tangible personal property situated within the State of Montana, title to which was held by Federal Surety Company September 25, 1931, and has passed to E. W. Clark, Receiver and/or liquidating officer, as aforesaid. That the rentals, profits and proceeds of property so held, managed and disposed of be held and disbursed by the said D. A. Crichton, Receiver, as hereinafter provided."

And insert in lieu thereof the following:

"That the said D. A. Crichton, Receiver as aforesaid take possession of and conserve and manage and dispose of as in this decree provided all real estate and tangible [fol. 42] personal property situated within the State of Montana, title to which was held by Federal Surety Company on the 25th day of August, 1932, excepting, however, any of such property previously seized under Writs of Execution or Attachment duly issued out of any of the Courts of this State."

(3) By striking all of paragraphs (8) and (9) of said Order appearing on pages 4 and 5 thereof, and reading as follows:

"(8) If and when claims allowed by Order of this Court either upon recommendation of the Receiver or after hearing, are allowed by Order of the District Court of the State of Iowa, in and for Scott County, as claims entitled to share in the assets coming into the hands of the liquidating officer along with other claims of similar rank, D. A. Crichton, Receiver as aforesaid, shall forthwith transfer and remit to E. W. Clark, Receiver and/or Liquidating officer as aforesaid, all money and property in his hands as such receiver, except so much thereof as has been determined by Order of this Court to be subject to specific liens or rights, and except so much thereof as may be necessary to pay and discharge costs of administration in this proceeding, including the Compensation of D. A. Crichton, Receiver and of his Attorneys.

"(9) In the event that claims allowed and determined in this proceeding are not allowed and determined in such manner as to permit those claimants to share ratably with all other creditors of Federal Surety Company in the assets distributed by E. W. Clark, Receiver and/or Liquidating Officer as aforesaid, all money and property coming into the hands of D. A. Crichton, Receiver, shall be retained by him for distribution to creditors whose claims are determined in this proceeding, such distribution to be in accordance with orders of this Court to be entered upon application then made by the said D. A. Crichton, Receiver, at that time."

(4) By striking from pages 5 and 6 thereof, the following portion of paragraph (12) thereof:

"and/or the said E. W. Clark, Receiver and/or liquidating officer as aforesaid; and that the Industrial Accident Board of the State of Montana and the Clerk of the District Court [fol. 43] of Lewis and Clark County, Montana, are hereby respectively ordered and directed to deliver all assets, bonds or money of the Federal Surety Company in their possession or control, or in the possession or control of either of them, to said D. A. Crichton, Receiver, as aforesaid, and/or the said E. W. Clark, Receiver, and/or liquidating officer, as aforesaid,"

and inserting in lieu thereof a direction to the Receiver to pay the claims of Montana creditors in full before remitting any portion of said assets to the Iowa receiver.

(5) By striking from paragraph (12) on page 6 of said Order, the following portion thereof:

"and it is further ordered that the order of this court heretofore made on May 24th, 1932, in this case, granting permission to Harry O. Williard, C. W. Hay and W. W. Wheaton, as Trustees of the Gordon Campbell Kevin Syndicate, to levy executions issued upon judgments heretofore obtained by them against the Federal Surety Company be and the same is hereby revoked, annulled and set aside,"

and insert in lieu thereof a direction to the Receiver to recognize the validity of levies made under Execution issued upon judgment obtained by these moving parties.

This motion is made and renewed separately as to each of the paragraphs above mentioned, and is based upon the following grounds:

(1) That the original Order appointing the Receiver in this action made and entered on the 26th day of March, 1932, was null and void and did not have the effect of drawing into the custody of this Court the property of Federal Surety Company of Davenport, Iowa, in the possession of the Industrial Accident Board of the State of Montana, or the moneys in the possession of the Clerk of the District Court of the First Judicial District of the State of Montana;

(2) That at the time the order confirming the appointment of Receiver was made herein on the 25th day of August, 1932, these moving parties had a good and valid execution lien upon said property of Federal Surety Company of Davenport, Iowa, in the custody of the Industrial Accident Board and in the custody of the Clerk of the Dis-[fol. 44] trict Court of the First Judicial District of the State of Montana;

(3) That under the law of this state the defendant, Federal Surety Company of Davenport, Iowa, was continued in existence for the purpose of being sued so long as any policy or liability remained outstanding against it in this state;

(4) That under the law of this state, Montana creditors of Federal Surety Company of Davenport, Iowa, are entitled to be paid in full the amount of their claims against said Federal Surety Company out of assets of said Federal Surety Company of Davenport, Iowa, situated within the State of Montana before any portion thereof is remitted to the foreign Receiver;

(5) That by virtue of the levy of Execution made under Writs issued upon the Judgment obtained by these moving parties the property levied upon was drawn into the custody and control of the District Court of the Tenth Judicial District of the State of Montana, and the District Court of the Eighth Judicial District of the State of Montana had no jurisdiction to interfere with such custody and control of the District Court of Fergus County by entry of its order made on August 25, 1932.

This motion will be based upon the records and files in this action and upon the Affidavit of Harry O. Williard hereto attached.

Louis P. Donovan, Belden & DeKalb, Attorneys for Harry O. Williard, W. W. Wheaton, C. W. Hay, as Trustees of Gordon Campbell Kevin Syndicate.

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF MONTANA,
County of Fergus, ss:

Harry O. Williard, being first duly sworn, deposes and says:

That he, together with C. W. Hay, and W. W. Wheaton are the duly elected, qualified and acting Trustees of Gordon Campbell-Kevin Syndicate, a common law trust; that [fol. 45] Affiant makes this Affidavit for and on behalf of said Gordon Campbell-Kevin Syndicate and his co-trustees in support of a Motion herein;

That on the 15th day of January, A. D. 1925, in an action instituted against said Trustees and said Gordon Campbell-Kevin Syndicate in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, by Gordon Campbell Petroleum Company, a corporation, on an alleged cause of action on an account stated, the Plaintiff in said last mentioned action caused to be filed an Affidavit for an Attachment in due form, and caused to be executed an Undertaking on Attachment, executed by Federal Surety Company, a corporation, and which Affiant alleges is the corporation named as a defendant in the above entitled action; that thereafter such proceedings were had and made in the said action so instituted by said Gordon Campbell Petroleum Company that a judgment was duly given and made in said District Court in favor of said Gordon Campbell Petroleum Company against the said Syndicate and the then trustees thereof, for the sum of $40,903.94, with interest at the rate of eight per cent per annum from March 4, 1924, together with costs, amounting in all to $45,448.24;

That thereupon the said Gordon Campbell Kevin Syndicate and its said Trustees appealed from the said judgment to the Supreme Court of the State of Montana therefrom

and on the 28th day of January, 1926, the said judgment so entered in favor of said Gordon Campbell Petroleum Company against said Syndicate and its said Trustees was reversed and the said cause was remanded to the said District Court of Cascade County with directions to enter judgment in favor of said Syndicate and its said Trustees and against the Plaintiff, all of which was done, and all of which proceedings on appeal appear in Vol. 75 of the Montana Reports, page 261;

That thereafter the said Gordon Campbell-Kevin Syndicate and its then Trustees commenced an action in the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, against said Federal Surety Company for the sum of $10,000.00, together with interest at the rate of eight per cent per annum from the 2nd day of March, 1926, amounting to the sum of $14,968.90, besides costs of suit amounting to $10.50, all of which appears as is fully set forth in a full, true and cor-
[fol. 46] rect copy of the Judgment Roll in said last named action, hereunto annexed, marked Exhibit No. 1 and by reference thereto made a part hereof;

That during and throughout the said proceedings in said last named cause, the said Defendant, Federal Surety Company, was represented by duly and regularly licensed and admitted attorneys and counsellors at law, and who were duly and regularly notified of the setting for trial of said action, and who were present thereat, and who made no other or further motions or objections than are set forth in the minutes of the Court, contained in said Judgment Roll, and that said Judgment, as set forth in said Judgment Roll, was duly given and made on the 20th day of May, 1932, and that no appeal has been perfected therefrom, or sought therein, nor has any Bill of Exceptions been tendered or offered within the time allowed by law therefor, nor has the time therefor been extended in any manner, and that due notice of entry of judgment therein was given, all as set forth in copy thereof, hereunto annexed, marked Exhibit No. 2 and by reference thereto made a part hereof;

That thereafter Affiant and his co-plaintiffs and said Syndicate caused to be issued out of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, aforesaid, in said cause, so instituted by them against said Federal Surety Company, a

Writ of Execution, signed by the Clerk of Court thereof and sealed with the seal of said Court, and directed to the Sheriff of Lewis and Clark County, Montana, and that thereupon the said Sheriff of Lewis and Clark County, Montana, duly levied upon certain property and bonds of said Federal Surety Company in the hands of A. H. Stafford, Commissioner of Agriculture of the State of Montana, amounting to about $19,000.00 and Affiant exhibits hereto, as Exhibit No. 3, a full true and correct copy of said Writ of Execution and, thereafter, on or about the 26th day of May, 1932, the said Sheriff of Lewis and Clark County made a further levy upon the sum of about $8,500.00 of funds in the hands of the Clerk of the District Court, in and for Lewis and Clark County, Montana, belonging to the said Federal Surety Company, its officers or agents, in trust therefor, and that while, as Affiant is informed and believes, the same was not necessary, the consent and ratification of this Honorable Court therefor in [fol. 47] the above entitled action was obtained on the 24th day of May, 1932, all of which appears in the files and records in the above entitled action, to which reference is hereby made;

That thereafter a Motion was made to discharge and annul the said Order of May 24th, so granting leave to levy the said Execution and ratifying the same, all of which appears in the files and records herein; that thereafter this Honorable Court did sustain the said Motion to so annul the said Order, all as appears in the files and records herein;

That Affiant and his said co-trustees and the said Gordon Campbell-Kevin Syndicate have not collected the said Judgment, and the same remains wholly unpaid, but as Affiant is informed and believes, together with the said judgment of Affiant, his co-trustees and said Gordon Campbell-Kevin Syndicate, there are Montana creditors of said Federal Surety Company having claims and demands aggregating in the neighborhood of about $25,000, and that the total known assets of said Federal Surety Company in the State of Montana are represented by the said funds in the hands of said Treasurer of the Industrial Accident Board and in the hands of the Clerk of the Court of Lewis and Clark County, Montana, as aforesaid; that Affiant is further informed and believes that the liabilities of said Federal Surety Company are such that after all of its

assets are marshalled in the State of Iowa, only a few cents on the dollar will remain to be paid the creditors of said Federal Surety Company; that such information was directly obtained by the Attorneys for Affiant, and his said co-trustees, from the direct and responsible authority of one of the attorneys for said Federal Surety Company and its alleged Receiver in the State of Iowa;

That the Order and Decree of this Court, made on the 25th day of August, 1932, directing the Receiver herein to collect the assets aforesaid, and ultimately transmit the same out of this jurisdiction, was made and entered without Notice to Affiant, his co-trustees or the said Gordon Campbell-Kevin Syndicate, or the attorneys therefor, and without their presence, and that if the said Order stands and remains as the Order of this Court, Affiant and his co-trustees will be greatly injured and damaged in common with all of the Montana creditors, including the State of [fol. 48] Montana, who is one of said creditors, of said Federal Surety Company;

That the defendant, Federal Surety Company, is and at all of the times herein mentioned was a foreign surety company organized under the laws of the State of Iowa and transacting a surety company business within the State of Montana until the 25th day of September, 1931, and that in connection with the business of said Federal Surety Company within the State of Montana it complied with the requirements of the law of the State of Montana regulating the admission of such companies to transact business in the state, and appointed in writing the Insurance Commissioner of this state to be the attorney of said Federal Surety Company in this state upon whom all process in any proceeding against such company could be served and by the terms or said power of attorney, the said Federal Surety Company did stipulate and agree on its part that any lawful process against the Federal Surety Company which was served on said attorney should be of the same legal force and validity as if served upon the said company, and that the said authority of said attorney should continue in force so long as any policy or liability of said Federal Surety Company remained outstanding against the said Federal Surety Company in the State of Montana; and a certificate of such appointment duly certified and authenticated was filed in the office of the Insurance Com-

missioner of the State of Montana a long time prior to the 25th day of September, 1931, and said Certificate was not, in any manner, revoked, vacated or annulled.

Harry O. Williard.

Subscribed and sworn to before me this 29th day of August, A. D. 1932. My commission expires June 26th, 1934. C. C. Williamson, Notary Public for the State of Montana, Residing at Lewistown, Montana. (Seal.)

[fol. 49] EXHIBIT NO. 1 TO AFFIDAVIT

Judgment Roll

IN THE DISTRICT COURT OF THE TENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF FERGUS

HARRY O. WILLIARD, C. W. HAY, and W. W. WHEATON, as Trustees of the Gordon Campbell-Kevin Syndicate, a Common-law Trust, Plaintiffs,

vs.

FEDERAL SURETY COMPANY, a Corporation, Defendant

Amended Complaint

Plaintiffs complain and allege:

I

That on or about the month of April, 1921, by virtue of Articles of Trust in writing, signed and executed by Gordon Campbell, Helen M. Campbell and L. C. Stevenson, there was created a common law trust, to operate under the name of Gordon Campbell-Kevin Syndicate; that said common law trust still exists and operates and has existed and operated at all times hereinafter mentioned since its organization, with its principal office and place of business designated and being at Lewistown, Montana; that during the month of January, 1925, and down to the month of January, 1926, the trustees of said common law trust, duly and regularly elected, qualified and acting, were Harry O.

Williard, W. D. Roy and E. M. Harvey; that since the 5th day of January, 1926, the trustees of said common law trust, were the above named plaintiffs, Harry O. Williard, C. W. Hay and W. W. Wheaton, who at all times since have been and still are the duly and regularly elected, qualified and acting trustees of the said common law trust;

II

That at all times hereinafter mentioned, the defendant, Federal Surety Company, was, and still is a corporation, created, organized and existing under and by virtue of the [fol. 50] laws of Iowa, but duly licensed and authorized, to do and transact business in the State of Montana, and at all of said times and at the present time having and maintaining its duly constituted agent in the State of Montana for the purpose of transacting business in the State of Montana *for the purpose of transacting business in the State of Montana,* and upon whom service of process in any action against it may be made.

III

That on or about the 15th day of January, 1925, the Gordon Campbell Petroleum Company commenced an action in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, by filing a verified complaint against the said common law trust, Gordon Campbell-Kevin Syndicate, plaintiff, and its then trustees, Harry O. Williard, W. D. Roy and E. M. Harvey, on an alleged cause of action based upon an alleged account stated, for the sum of Forty-one Thousand ($41,000.00) Dollars, and in the said action caused to be executed in behalf of said plaintiff, an affidavit for attachment, and furnished and provided an undertaking on attachment in the sum of Ten Thousand Dollars ($10,000.00), a copy of which said Undertaking on attachment is hereto appended, marked Exhibit "A", and by reference thereto made a part hereof, and which said undertaking on attachment was duly and regularly executed for and in behalf of said attachment by the said defendant, Federal Surety Company; that the reference in said bond to Gordon Campbell-Kevin Syndicate, a corporation, was intended to describe the above named plaintiff; that said

obligation was to be performed at the place of business of plaintiff at Lewistown, Fergus County, Montana; that at the said time, the said Syndicate was the owner of a large amount of oil and gas property consisting of oil and gas leases, all in the Kevin Sunburst Oil Field in the County of Toole, State of Montana, and books of account and office furniture and fixtures, and plaintiffs aver that all of the same were properly classified and described as chattel or personal property and chattels real, or property partaking both of the nature of personal property and real estate, and that the said plaintiff in the said action so filed in the said District Court of the Eighth Judicial District of the [tol. 51] State of Montana, in and for the County of Cascade, caused writs of attachment to issue out of said court, signed by the Clerk thereof and attested by the seal of said Court and directed to the Sheriffs of Toole and Cascade Counties, Montana, with instructions to the said Sheriffs of Toole County and Cascade County, Montana, to levy upon all of the property and property rights of the said Gordon Campbell-Kevin Syndicate, a common law trust, and that in obedience to the said writs of attachment the said sheriffs, on or about the 15th day of January, 1925, seized and levied and placed a cloud upon all and singular the property of the said Gordon Campbell Kevin Syndicate, including all of the oil and gas leases belonging to the Gordon Campbell-Kevin Syndicate, in the said Kevin Sunburst Oil field; that in complying, or attempting to comply with the said instructions of the attorney for plaintiff, in said action, and in said writ of attachment, the said Sheriff of Toole County, Montana, on the 17th day of January, 1925, filed in the office of the County Clerk and Recorder of Toole County, Montana, a copy of said writ of attachment, together with a description of the property standing upon the records of the said County in the name of the defendant, Gordon Campbell-Kevin Syndicate, in said action, and a notice that the same was attached, and also a description of the leasehold interests belonging to the said defendant, Gordon Campbell-Kevin Syndicate, or defendants, and standing in the name of some other person therein designated by name, and a notice that such property and any interest of the defendant, Gordon Campbell-Kevin Syndicate, or defendants, therein was attached a copy of the said instrument so filed in the office of the County Clerk and Recorder in Toole County is hereunto

attached, marked Exhibit "B", and by reference thereto hereof made a part; that by reason of said levy or attempted levy of said writ of attachment, plaintiffs' title to all of the property described in said Exhibit "B" was clouded and rendered unmarketable and unmerchantable; that immediately after the commencement of the said action by the said Gordon Campbell Petroleum Company in the said District Court against the said Gordon Campbell-Kevin Syndicate, and its then Trustees, the said trustees consulted with and employed Belden & DeKalb and Merle C. Groene, of Lewistown, Montana, and Louis P. Donovan [fol. 52] of Shelby, Montana, attorneys at law, for the purpose of dissolving and annulling the said attachment, and securing a release of the said property from attachment, and removing such cloud and encumbrance and that the said attorneys entered upon their said employment but advised the said Gordon Campbell-Kevin Syndicate, and its then trustees, that they could find no formal defects entitling them to move summarily for a dissolution of said attachment, and the removal of the said cloud created thereby, and that it would be necessary to secure a dissolution of the said attachment and removal of the said cloud created thereby by and through a defense on the merits of said cause, and that insofar as the merits of said cause were concerned, it was their opinion that the plaintiff, Gordon Campbell Petroleum Company, was a company possession three directors, two of whom were, at the time of the alleged statement of account, trustees of the Gordon Campbell-Kevin Syndicate, with whom said account was alleged to have been stated, and that the Gordon Campbell Petroleum Company was largely owned and controlled by Gordon Campbell, who was also one of the said trustees of the said Syndicate at that time; and that the said attorneys did undertake to secure a dissolution of the said attachment and removal of such cloud by such defense, and that so far as the merits of the said cause were concerned, the said attorneys advised that they expected to experience but little difficulty and that the action, in and of itself, would offer little or no embarrassment to the defendants aside from the issuance of said writ of attachment and the levy or attempted levy thereupon and cloud created thereby upon all of the said property of the said defendant, Gordon Campbell-Kevin Syndicate, or defendants, and that by reason of the issuance of said

writ of attachment, the said trustees of Gordon Campbell-Kevin Syndicate were obliged to employ, and did employ, the said attorneys above named for the purpose of dissolving the said attachment and removal of the cloud created thereby by and through such defense on the merits, for a reasonable fee, which plaintiffs alleged to be Twelve Thousand Five Hundred ($12,500.00) Dollars; that there was no other available means of testing the right of the said Gordon Campbell Petroleum Company to the issuance of the said writ of attachment except by a trial of said action upon [fol. 53] the merits; that the said attorneys entered upon said employment and consented to, and did, defeat the said action for the said purpose; and that thereafter, on or about the 15th day of February, 1926, the defendants in said action, Gordon Campbell-Kevin Syndicate, and the trustees thereof, recovered a judgment in said action duly given and made by the Supreme Court of the State of Montana, and the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, duly given, made and entered pursuant to the remittitur issued out of the Supreme Court of the State of Montana, and whereby the said writ of attachment and levies and attempted levies made thereunder, and clouds created thereby, were dissolved and annulled and set aside.

IV

That the said issuance of said writ of attachment and the levy and cloud created thereby was and were wrongful and was maintained under the said action by the Gordon Campbell Petroleum Company from the 15th day of January, 1925, to on or about the 15th day of February, 1926, and that during the maintenance of said action, the said properties so attached and clouded by and through the said writ, and the levy and attempted levy thereof, became greatly depreciated in value since the said properties consisted wholly of oil and gas leases and property capable of rapid depreciation in value by and through the efflux of time and were, during the time the said attachment and cloud created thereby were maintained, properties which plaintiffs could and would have sold except they were prevented by said attachment and cloud; that the said properties depreciated in value during the period of time the same were held under said attachment and the cloud created thereby,

in the sum of Twenty-five Thousand ($25,000.00) Dollars; and that plaintiffs did sell certain of its said property interests as hereinafter set forth; that by reason of the issuance of said writ of attachment and the cloud created thereby upon the said properties of plaintiff, and particularly upon the oil and gas leaseholds standing in the name of Lee M. Ford, trustee, as described in Exhibit "B" hereunto attached, plaintiff was prevented from selling the said properties standing in the name of Lee M. Ford, trustee, [fol. 54] or any thereof, during the time that said cloud existed upon plaintiffs' title thereto at the reasonable market value thereof, or at any value except a sum greatly less than the reasonable market value of said oil and gas leaseholds, and that if it had not been for the issuance of said writ of attachment, plaintiff could and would have sold said oil and gas leaseholds standing in the name of Lee M. Ford, trustee, in or about the month of September, 1925, at the reasonable market value thereof, but by reason of the issuance of the said writ of attachment, and the levies and attempted levies made thereunder, plaintiff was obliged to sell and did sell on or about the month of September, 1925, the said oil and gas leaseholds standing in the name of said Lee M. Ford, Trustee, at a price approximately Sixty Thousand Dollars ($60,000.00) less than the reasonable market value thereof, if the said writ of attachment had not been issued, and a price approximately Sixty Thousand Dollars ($60,000.00) less than the amount at which plaintiff could and would have sold the same if the said writ of attachment had not been issued; that in the conduct and defense of said action in which the said writ of attachment was issued, the said defendants in said action necessarily incurred expense in maintaining their said defense, for the purpose of securing the dissolution of the said attachment and the removal of said cloud, in the sum of Four Hundred Eighteen and 70/100 ($413.70) Dollars, which consisted of items which could not be taxed as costs in said action but which arose and were incurred as follows, to-wit: In the sum of Thirty-two and 10/100 Dollars ($32.10), which was necessarily incurred in good faith by securing from one Dudley Crowther, a court reporter, a transcript of certain testimony of Gordon Campbell given in an action instituted in the district court of the Nineteenth Judicial District of the State of Montana, in and for Toole County, germane to questions arising in the said action in which the said at-

tachment was so issued, and to be used for impeachment purposes; and in the further sum of Three Hundred Eighty-six and 60/100 Dollars ($386.60), paid to one W. B. Finlay, certified public accountant, for services rendered the said Gordon Campbell-Kevin Syndicate in making an audit of the books, papers, and records of the said Syndicate, then held under attachment in said action, so instituted in the [fol. 55] said District Court of the Eighth Judicial District, all necessarily incurred in good faith for the purposes of enabling the said Gordon Campbell-Kevin Syndicate to make an intelligent presentation of its defense in said action for the purpose of securing a dissolution of said attachment, and made necessary by unprecedented action of the said Gordon Campbell Petroleum Company in attaching in said action all and singular the books, records and papers of the said Syndicate, then in its own hands, and placing the same in the hands of the Sheriff of Cascade County, Montana, and thereby preventing the possession thereof by the said Gordon Campbell-Kevin Syndicate; that there were further taxed as costs in said action the sum of Five Hundred Sixty-one and 80/100 Dollars ($561.80), none of which have been paid;

V

That plaintiffs have been damaged by the wrongful issuance and levy of the said attachment, and resulting cloud, in the several amounts above set forth all of which said sums were damages proximately incurred by virtue of the said attachment, and cloud, none of which have been paid by the defendant; that plaintiffs have made demand upon said defendant for the payment of the full amount of its liability under said bond, but defendant has failed, neglected and refused to pay plaintiffs said sum or any part thereof.

Wherefore Plaintiffs pray judgment against the said defendant in the sum of Ten Thousand ($10,000.00) Dollar-, together with their costs and disbursements herein expended and incurred, together with interest on said sum from the 28th day of January, 1926.

Belden & DeKalb, Merle C. Groene, Louis P. Donovan, Attorneys for Plaintiffs.

(Duly verified.)

[fol. 56] EXHIBIT "A" TO EXHIBIT 1

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR CASCADE COUNTY

GORDON CAMPBELL PETROLEUM COMPANY, a Corporation, Plaintiff,

vs.

GORDON CAMPBELL KEVIN SYNDICATE, a Corporation; HARRY O. WILLIARD, E. M. Harvey, W. D. Roy, as Trustees of Gordon Campbell Kevin Syndicate, Defendants

Undertaking on Attachment

Whereas, the above named Plaintiff has commenced or is about to commence, an action in the above entitled Court against the above named Defendants, to recover of Defendants, Gordon Campbell Kevin Syndicate, a corporation, Harry O. Williard, E. M. Harvey, W. D. Roy, as Trustees of Gordon Campbell Kevin Syndicate, the sum of Forty-one Thousand Six Hundred Fifty-one and 07/100 Dollars with 6 per cent per annum interest on the sum of $40,903.94 from the 3rd day of March, 1924, and on the sum of $747.07 from Jan. 1, 1925, alleged to be due and owing from said Defendant- to said Plaintiff and is about to issue out a Writ of Attachment in said action against the property of said Defendants as allowed by law in such cases, and have made the necessary affidavit therefor.

Now, therefore, in consideration of the premises, and of the issuing of said Writ of Attachment, we, the undersigned Sureties, residents of said County, State of Montana, hereby undertake and bind ourselves in the sum of Ten Thousand Dollars, that if the Defendant- recover judgment in said action, or if the Court shall finally decide that the plaintiff was not entitled to any attachment, the Plaintiff will pay all costs that may be awarded to the Defendant-, and all damages he may sustain by reason of the issuing out of the attachment not exceeding the sum of Ten Thousand and No/100 Dollars.

Witness our hands this 15th day of January, A. D. 1925.

Federal Surety Company, by D. A. Crichton, Attorney-in-fact.

(Duly verified.)

Filed Jan. 15th, 1925.

George Harper, Clerk. J. E. Hilgard, Deputy Clerk. (Seal.)

[fol. 57] EXHIBIT "B" TO EXHIBIT 1

Notice of Attachment

GORDON CAMPBELL PETROLEUM COMPANY, a Corporation, Plaintiff,

vs.

GORDON CAMPBELL KEVIN SYNDICATE, HARRY O. WILLIARD, E. M. Harvey, and W. D. Roy, as Trustees of the Gordon Campbell Kevin Syndicate, Defendants

Notice is hereby given that by virtue of a Writ of Attachment issued out of the Eighth Judicial District Court of the State of Montana, in and for the County of Cascade, I have this day attached all right, title and interest of the above named Defendants *Defendant* in the following described property, to-wit:

Lessor	Description	Sec., twp., rge.
H. F. Altman	E. ½ NW. ¼, S. ½ NE. ¼	15, 34, 3 W
A. L. Beaupre	W. ½ SW. ¼	5, 35, 2
	N. ½ N. ½	27, 34, 3
C. E. Carlson and W. R. C. Stewart	NE. ¼ NE. ¼, W. ½ E. ½, SE. ¼ SE. ¼	25, 35, 3
Elmer Dahlquist	W. ½ SE. ¼	21, 35, 3
Robert Davidson	E. ½ NE. ¼	28, 35, 3
Albert Goeddertz, Jr.	NW. ¼ NE. ¼, E. ½ NW. ¼, SWNW. ¼	11, 36, 3
	SESE	17
	E. ½ NE	20
	NW. ¼ NW. ¼	21
Albert Goeddertz, Jr.	NE. ¼, N. ½ SE. ¼	16, 35, 3
Albert Goeddertz, Sr.	SWNW., NWSW	6, 36, 2
	N. ½ N. ½, SENW., SENE	19, 36, 2
	SENE., NESE	1, 36, 3
	NESE	10
	SW. ¼	8
	NENE., S. ½ NE. ¼, SWNW	
	SW. ¼, N. ½ SE., SWSE	15
	E. ½ NE	21
	W. ½ NW	22
	S. ½ NW., NWSW	27
	N. ½ NW., N. ½ SE., SWSE., SESW	28
	S. ½ S. ½	30
Albert Goeddertz, Sr.	S. ½ SE	19, 36, 2
	SESE	22, 35, 3
	SENW., E. ½ SW., NWSE	26
	SENE	34
Martin Goldrick	W. ½ W. ½	20, 36, 3
Gideon Gunderson	Lots 1 & 2	19, 35, 2
	N. ½ NE	24, 35, 2
G. C. Larson	W. ½ SE., E. ½ SW	7, 35, 2
Imilda Larson	E. ½ SW	17, 35, 2
R. C. Lehman	S. ½ NW	3, 34, 3
John E. Lewis	E. ½ E. ½	5, 34, 3

[fol. 58] Lessor	Description	Sec., twp., rge.
Mary Solberg	W. ½ NE	29, 35, 3
Alice Steven	NE. ¼, E. ½ SE	32, 35, 3
J. J. Stinson	SW. ¼	29, 34, 3

I

You will also attach all the right, title and interest of the Gordon Campbell-Kevin Syndicate in and to those certain oil and gas leases standing of record in the name of Lee M. Ford, Trustee, covering the following described lands situated in the County of Toole, State of Montana, and described as follows, to-wit:

Lessor	Description	Sec., twp., rge.
Joseph Byrne	N. ½ NW., SENW	25, 35, 2 W
C. Lashbaugh	NE. ¼	34, 35, 2
Aurel J. Abell	NW. ¼, E. ½ SW. ¼	35, 35, 2
Edward Byrne	E. ½ SE. ¼	35, 35, 2

You will also attach all the right, title and interest of the Gordon Campbell-Kevin Syndicate in and to those certain oil and gas leases standing of record in the name of the Western Petroleum Exploration Company, covering the following described lands situated in the County of Toole, State of Montana, and described as follows, to-wit:

Lessor	Description	Sec., twp., reg.
Henry Swears	S. ½ SW. ¼	4, 35, 2 W
Sarah Swears	SW. ¼	9, 35, 2
Anna Kenny	NE. ¼	15, 35, 2
Fenna Bruins	S. ½ S. ½	10, 35, 2
		9, 35, 2

Dated at Shelby this 17th day of January, 1925.

T. H. Daley, Sheriff, by W. B. Martin, Under Sheriff.

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF CASCADE

GORDON CAMPBELL PETROLEUM COMPANY, a Corporation,

Plaintiff,

vs.

GORDON CAMPBELL KEVIN SYNDICATE, HARRY O. WILLIARD, E. M. Harvey, and W. D. Roy, as Trustees of the Gordon Campbell Kevin Syndicate, Defendants

Writ of Attachment

The State of Montana to the sheriff of Toole County, Greetings:

Whereas, The above entitled action was commenced in the District Court of the Eighth Judicial District of the

[fol. 59] State of Montana, in and for the County of Cascade, by the plaintiff in said action, to recover from the Defendants in said action the sum of Forty-one Thousand six hundred fifty-one and 01/100 ($41,651.01) Dollars Currency of the United States, besides interest at the rate of 8 per cent per annum on $40,903.94 from March 3, 1924, and interest on $747.07 from the 1st day of January, A. D. 1925, and costs of suit; and the necessary affidavit and undertaking herein being filed as required by law.

Now, we do therefore command you, the said Sheriff, that you attach and safely keep all the property of the said Defendants within your said county not exempt from Execution, or so much thereof as may be sufficient to satisfy the said Plaintiff's demand, as above mentioned, unless the said Defendants give you security by the undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking, and hereof make due and legal service and return.

Witness H. H. Ewing, Judge of the Eighth Judicial District at the Court House in the County of Cascade, the Seal of said Court this 15th day of January, A. D. 1925.

Attest my hand and seal of said Court the day and year last above written.

George Harper, Clerk, by J. E. Hilgard, Deputy Clerk. (Court Seal.)

Filed for record January 17th, 1925, at 5:00 o'clock P. M.
J. R. MacFarlane, County Recorder.

Amended Complaint endorsed on back: "Filed Jan. 31st, 1928. Bert Replogle, Clerk."

Title of Court, Title of Cause

Answer.

Comes now the defendant above named and for its answer to Plaintiffs' amended complaint served and filed on January 31, 1928, admits, denies and alleges as follows:

I

Admits the allegations contained in paragraph II of plaintiffs' said amended complaint, and denies generally [fol. 60] and specifically each and every other allegation, matter and thing in plaintiffs' said Complaint contained, and particularly and specifically denies that the plaintiffs have been by reason of the acts therein complained of, or by any other reason attributable to defendant, damaged as set forth in said amended complaint in the sums therein mentioned, or in any other sum or sums at all.

Wherefore Defendant, having fully answered plaintiffs' amended complaint, prays that the plaintiffs take nothing and that the defendant have judgment for its costs; and for such other and further relief as is meet, just, legal and equitable in the premises.

Ayers & Polutnik, Attorneys for Defendant.

(Duly verified.)

Answer endorsed on back: "Filed this 29th day of Feb. A. D. 1928. Bert Replogle, Clerk of Court, by C. Smith, Deputy Clerk.

Title of Court and Cause

#14567

Court Minute

Friday, the 20th day of May, 1932.

This matter came on regularly for trial this day having been continued from May 19th, 1932, H. Leonard DeKalb appearing as counsel for the Plaintiffs, and Robert C. Ayres of the firm of Ayres & Ayres appearing as counsel for the Defendant. Counsel for the Plaintiffs thereupon informed the Court that they were ready for trial and counsel for the Defendant informed the court that they were not ready for trial. The case was thereupon called for trial and the following witnesses were sworn and testified on behalf of the plaintiffs, to-wit: Harry O. Williard and H. Leonard DeKalb.

Proof having been submitted and the Court being fully advised in the premises, judgment is ordered in favor of the Plaintiffs.

[fol. 61] In the District Court of the Tenth Judicial District of the State of Montana in and for the County of Fergus

Harry O. Williard, C. W. Hay, and W. W. Wheaton, as Trustees of the Gordon Campbell-Kevin Syndicate, a Common-law Trust, Plaintiffs,

vs.

Federal Surety Company, a Corporation, Defendant

Judgment

This cause came on regularly for trial before the Court, O. F. Goddard, a Judge of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, sitting in the place of the Judges of the Tenth Judicial District, disqualified, and having been regularly called to preside in the above entitled action, this 20th day of May, A. D. 1932, the cause having been duly and regularly set and noticed for trial, and notice having been given the respective parties, the Plaintiffs appearing in person and by and with their counsel, Belden & DeKalb, and the Defendant not appearing at the trial, and the default of the Defendant having been duly and regularly entered for such non-appearance, the Court proceeded to hear the sworn testimony and the evidence introduced in support of the allegations of the Complaint, and the law and the evidence being by the Court considered,

And the Court being fully advised in the premises, and it appearing that Plaintiffs are entitled to a judgment against the Defendant for the relief prayed for in their Complaint,

It is accordingly ordered, adjudged and decreed that Plaintiffs do have and recover of and from the Defendant, Federal Surety Company, the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of eight per cent per annum from the 2nd day of March, 1926, making a total judgment, for principal and interest, of Fourteen Thousand Nine Hundred Sixty-eight and 90/100 Dollars ($14,968.90), and for Plaintiffs' costs and [fol. 62] disbursements herein expended and incurred, hereby taxed at the sum of Ten and 50/100 Dollars ($10.50).

Done in open court this 20th day of May, A. D. 1932.

O. F. Goddard, Judge of the Thirteen- Judicial District of the State of Montana, Presiding in said Cause.

Endorsed: Filed May 20th, 1932. B. W. Walker, Clerk, by J. E. Walker, Deputy Clerk.

Judgment roll endorsed: Filed this 21st day of May, A. D. 1932. B. W. Walker, Clerk of Court, by C. Smith, Deputy Clerk.

EXHIBIT No. 2 TO AFFIDAVIT

IN THE DISTRICT COURT OF THE TENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF FERGUS

HARRY O. WILLIARD, C. W. HAY, and W. W. WHEATON, as Trustees of the Gordon Campbell-Kevin Syndicate, a Common-law Trust, Plaintiffs,

vs.

FEDERAL SURETY COMPANY, a Corporation, Defendant

Notice of Entry of Judgment

To the above-named defendant and to its attorneys, Messrs. Ayers & Ayers and Donald Campbell:

You are hereby notified that on this 20th day of May, A. D. 1932, Judgment was rendered in the above entitled action, in favor of the Plaintiffs and against the Defendant for the relief demanded in Plaintiffs' Complaint.

Dated this 20th day of May, A. D. 1932.

Louis P. Donovan, Belden & DeKalb, Attorneys for Plaintiffs.

Service of within Notice had and received by copy thereof this 20th day of May, 1932.

Ayers & Ayers, Attorneys for Defendant.

Endorsed: Filed May 27, 1932.

[fol. 63] EXHIBIT No. 3 TO AFFIDAVIT

IN THE DISTRICT COURT OF THE TENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF FERGUS

The State of Montana to the sheriff of Lewis and Clark County, in the State of Montana, Greeting:

Whereas, on the 20th day of May, A. D. 1932, Harry O. Williard, C. W. Hay and W. W. Wheaton, as Trustees of the Gordon Campbell-Kevin Syndicate, a common law trust, recovered a Judgment in the said District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, against Federal Surety Company, a corporation, for the sum of Fourteen Thousand Nine Hundred Sixty-eight and 90/100 Dollars ($14,968.90), damages, with interest thereon at the rate of eight per cent per annum until paid, together with $10.50 dollars costs and disbursements at the date of said judgment, and accruing costs, amounting to the sum of $14,979.40, as appears to us of record;

And whereas, the judgment roll, in the action in which said judgment was ordered, is filed in the Clerk's office of said Court, in the County of Fergus, and said Judgment was docketed in said Clerk's office, in said County, on the day and year first above written; and the sum of $14,979.40, with interest at the rate of eight per cent per annum from the 20th day of May, 1932, is now at the date of this Writ actually due on said judgment;

Now, you, the said sheriff, are hereby required to make the said sums due on the said judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy said judgment, out of the personal property of said debtor, or if sufficient personal property of said debtor cannot be found, then out of the real property in your County belonging to said debtor, on the day wherein said judgment was docketed in said County, or at any time thereafter; and make return of this writ within sixty days after the receipt hereof with what you have done endorsed thereon.

Witness the Honorable O. F. Goddard, the Judge who tried said cause, sitting in place of the Judges of the Tenth Judicial District of the State of Montana, disqualified, at

[fol. 64] the Court House in the County of Fergus, this 20th day of May, A. D. 1932.

Attest my hand and the seal of said Court the day and year last above written.

B. W. Walker, Clerk, by J. A. Walker, Deputy Clerk.
(Seal.)

That thereafter, the same came on by consent of all of said counsel for hearing on said 31st day of August, 1932, and, at said time, the said attorneys for Plaintiffs and for Defendant, E. W. Clark, presented, served and filed their objections to said Motion, in the words and figures as follows, to-wit:

OBJECTIONS TO MOTION TO VACATE ORDER AND DECREE—
Filed Aug. 31, 1932

Comes now E. W. Clark, Receiver and Liquidating Officer of Federal Surety Company, and D. A. Crichton, as Receiver of the Federal Surety Company of Davenport, Iowa, by and through their attorneys Molumby, Busha & Greenan, and Gunn, Rasch, Hall & Gunn, and objects to the Motion made on behalf of Gordon Campbell-Kevin Syndicate by and through its attorneys, L. P. Donovan and Belden & DeKalb asking to modify the Order Confirming the appointment of the Receiver duly made and given by this Court on the 25th day of August, 1932, upon the grounds and for the reason that if said Motion is sustained it would, in violation of Section 1, Article IV of the Constitution of the United States, deny full faith and credit to the public acts, records and judicial proceedings of the State of Iowa, made and entered in the District Court of the State of Iowa, in and for Scott County, a court of general jurisdiction, in the case entitled State of Iowa ex rel. John Fletcher, Plaintiff, vs. Federal Surety Company of Davenport, Iowa, Defendant, being cause No. 28238 in equity, in which cause said Federal Surety Company by decrees of said court, duly made and entered on September 25th, 1931, and December 22nd, 1931, was dissolved and E. W. Clark, Commissioner of Insurance of the State of Iowa, was then duly appointed statutory receiver and/or liquidating officer of said Federal Surety Company, and [fol. 65] vesting in him title to all property of said Federal

Surety Company, wherever situated, all of which is more fully shown in the duly exemplified copies of said decrees attached to and made a part of the answer and cross-petition of E. W. Clark as Receiver and/or Liquidating Officer of the Federal Surety Company of Davenport, Iowa, filed in this action pending in the district court of Cascade County, Montana, on the 25th day of August, 1932, to which decrees reference is hereby made.

Also, upon the further ground and for the reason that said motion, if sustained, would, in so far as it may enable resident creditors in Montana to secure a priority over non-resident creditors of the Federal Surety Company in the distribution of assets or payment of claims, constitute a violation of Section 2 of Article IV of the Constitution of the United States.

Gunn, Rasch, Hall & Gunn, Molumby, Busha & Greenan.

In conjunction therewith, the following facts were stipulated, to-wit:

STIPULATION AS TO FACTS

The moving parties, Harry Williard, W. W. Wheaton and C. W. Hay, as Trustees of the Gordon Campbell-Kevin Syndicate, and Gordon Campbell, admit that the statutory provisions of the State of Iowa in force at the time set forth in the complaint and cross-complaint in this action are correctly set forth in the said complaint and cross-complaint, and the said moving parties further admit that the copy or copies of judgments and orders attached to the cross-complaint in this action are true and correct copies of the original judgment and orders, given and made by the District Court of the State of Iowa, in and for Scott County, in the action entitled State of Iowa, ex rel. John Fletcher, plaintiff, vs. Federal Surety Company of Davenport, Iowa, defendant.

It was further agreed between the parties that each of the parties to the proceeding waived notice and time of [fol. 66] hearing of said Motions, and agreed that the same be forthwith heard and submitted to the Court and, in accordance therewith, the same were forthwith heard and submitted to the Court.

The following further proceedings were had on the said 31st day of August, 1932, and entered on the minutes of the Court, to-wit:

MINUTE ENTRIES

The Court: Let the record show that all the motions are denied.

Mr. Donovan: Let us ask for an order staying the proceedings for sixty days insofar as possession is concerned.

Mr. DeKalb: If it is understood that the Receiver will not dispose of or send any of this money out of the State of Montana until the appeal is disposed of.

Mr. Molumby: We will agree to that. Let the record show that.

Mr. DeKalb: It is agreed and understood by and between the plaintiff, the defendant and the petitioning creditor, Gordon Campbell Syndicate, and its trustees, that the Court shall make an order that none of the funds upon which the creditor, Gordon Campbell Syndicate, and its trustees, have made levy, shall be sent from the State of Montana, or otherwise disposed of than to remain in the custody of the Receiver until the determination of the proposed appeal of the Gordon Campbell-Kevin Syndicate.

The Court: The Court hereby orders that the Receiver retain in his possession the property upon which the foregoing creditor has a levy and execution until further order of the Court.

Mr. Donovan: May the record show that Harry Williard, W. W. Wheaton and C. W. Hay take exception to the orders of the Court, denying their motion to vacate the order confirming the Receiver, and also take exception to the order of the Court denying their Motion to modify the said order, and they ask for thirty days in addition to the time allowed by law in which to prepare, serve and file their bill of exceptions.

The Court: Let the time be granted.

[fol. 67] That on the 1st day of September, 1932, said D. A. Crichton petitioned the Court as follows:

PETITION FOR APPOINTMENT OF COUNSEL FOR RECEIVER—
Filed Sept. 1, 1932

Comes now D. A. Crichton, and respectfully represents to the Court that it is necessary to have the services and

advice of counsel in the above entitled matter; that he has consulted the firm of Molumby, Busha & Greenan, as such counsel, and is desirous of appointing them to act on behalf of the Receiver in all matters with reference to said Receivership.

Wherefore your Petitioner prays that he be permitted to employ the services of Molumby, Busha & Greenan as attorneys in all matters herein, and that his action in heretofore consulting and employing those services be ratified by this Court.

D. A. Crichton, Petitioner.

(Duly verified.)

Whereupon the Court made an order on said Petition as follows:

ORDER APPOINTING COUNSEL FOR RECEIVER—Filed Sept. 1, 1932

Upon reading and filing the verified Petition of D. A. Crichton, Receiver herein, and the Court being advised in the premises,

It is hereby ordered that the action of the said D. A. Crichton, as Receiver, in employing Molumby, Busha & Greenan as counsel for the Receiver, and the same is hereby ratified, and he is hereby empowered to employ their services in all matters touching said Receivership.

Dated Sept. 1, 1932.

H. H. Ewing, Judge.

Now, within the time allowed by law and the Order of Court, made herein on the 31st day of August, 1932, the said creditors, Harry O. Williard, W. W. Wheaton and C. W. Hay, as Trustees of the Gordon Campbell-Kevin Syndicate, present this as their Bill of Exceptions, of and concerning the Order made on May 24th, 1932, permitting levy of exe-
[fol. 68] cutions, as above set forth, and of and concerning their Motion to vacate and annul, and to modify the Order Confirming Appointment of Receiver, made and entered herein on the 25th day of August, 1932, which said Bill of Exceptions contains all of the evidence, or the full sub-

stance thereof, adduced and considered by the Court in the making of said Order complained of, and all of the records and proceedings in said cause, considered by the Court and pertaining to and affecting the consideration of the said Orders complained of, and pray that the same may be allowed, settled and filed herein, as a full, true and correct Bill of Exceptions herein.

Dated this 14th day of September, A. D. 1932.

Louis P. Donovan, Belden & DeKalb, Attorneys for Harry O. Williard, W. W. Wheaton, and C. W. Hay, as Trustees of Gordon Campbell-Kevin Syndicate, a Creditor Affected Thereby.

ORDER SETTLING BILL OF EXCEPTIONS—Filed Oct. 13, 1932

STATE OF MONTANA,
County of Cascade, ss:

I, H. H. Ewing, one of the Judges of the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, hereby certify:

That I am the Judge who passed upon and made the Orders excepted to, as shown in the foregoing Bill of Exceptions, and I further certify that the foregoing Bill of Exceptions was duly served upon all counsel for Plaintiff and Defendant, in the above entitled action, and duly and regularly came on for settlement and allowance, and

It is accordingly hereby further certified that the same is a full, true and correct Bill of Exceptions, containing all of the evidence, proceedings, papers and files and records of and pertaining to, and considered by, the undersigned, in the making and entry of the Judgment and Orders excepted to herein.

Done in Open Court this 13 day of October, A. D. 1932.

H. H. Ewing, District Judge.

NOTICE OF APPEAL—Filed Sept. 18, 1932

To John Mieyr, plaintiff; to Federal Surety Company of Davenport, Iowa, a corporation; to E. W. Clark, as Re-
[fol. 69] ceiver, and to D. A. Crichton, as Receiver, and to Messrs. Gunn, Rasch, Hall & Gunn and Messrs. Cook & Balluff and to Messrs. Molumby, Busha & Greenan, attorneys for the respective parties defendant:

You and each of you will please take notice that Harry O. Williard, W. W. Wheaton and C. W. Hay, as Trustees of Gordon Campbell-Kevin Syndicate, a common law trust, and Gordon Campbell Kevin Syndicate, a common law trust, hereby appeal to the Supreme Court of the State of Montana from that certain Judgment and Order confirming Appointment of Receiver, made and entered herein on the 25th day of August, 1932, wherein and whereby D. A. Crichton was confirmed as a Receiver herein, and wherein and whereby an Order of said Court, made on May 24th, 1932, granting Appellants leave to levy execution was revoked, annulled and set aside, and also from that certain Order made and entered herein on the 31st day of August, 1932, over-ruling Appellants' Motion filed herein August 31st, 1932, attacking the said Order and Decree made and entered, as aforesaid, on August 25, 1932, all rendered and entered, as aforesaid, in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, against the Appellants and in favor of the Plaintiff and Defendants above named, and from the whole thereof.

Dated September 17, 1932.

Louis P. Donovan, Belden & DeKalb, Attorneys for Above-named Appellants.

(Duly served.)

Clerk's certificate to foregoing transcript omitted in printing.

IN SUPREME COURT OF MONTANA

[Title omitted]

[File endorsement omitted.]

OPINION PER CURIAM—Filed April 1, 1933

Defendant Federal Surety Company prior to September 25, 1931, was a corporation organized under the laws of [fol. 70] Iowa and authorized to do business in Montana. The district court of Scott county, Iowa, in a proceeding

brought by the attorney general of that state, under statutory authority made an order an September 21, 1931, requiring the surety company to appear on September 25th and show cause why its affairs and business should not be dissolved and a receiver appointed to wind up its affairs and distribute its effects as provided by law. The order was served on the surety company and it failed to appear. The court thereupon entered a decree "that under and in accordance with the provisions of section 8964 of the Code of 1927 of the state of Iowa, the defendant, Federal Surety Company, shall be dissolved and its effects distributed." The decree also appointed E. W. Clark, commissioner of insurance of the state of Iowa, as receiver, gave him certain directions with respect to the property and the method of ascertaining and determining claims, and expressly retained jurisdiction, upon application of any party in interest, to give further orders, directions or decrees as may be necessary or proper. Clark duly qualified as receiver by filing bond and oath.

On December 22, 1931, the court, on application of the receiver, made a supplemental order and decree which recites that the court "finds, determines and adjudges: That pursuant to the power conferred by said sections, pursuant to the allegations set forth in the petition filed herein, as amended, and pursuant to good cause shown herein, as in said sections provided, this court did, on September 25, 1931, enter an order and decree in this cause, and thereby dissolved Federal Surety Company and terminated its corporate existence, and thereby appointed E. W. Clark, who was and is commissioner of insurance of the state of Iowa, as the receiver and/or liquidating officer, to take title to all property of the dissolved corporation for the purpose of liquidating and distributing its assets, as by law provided. That by virtue of the statutes hereinbefore referred to, as construed by the court of last resort in the state of Iowa, and by virtue of the proceedings in this cause, the said corporation, Federal Surety Company, ceased to exist upon the entry of the order and decree herein at 4:30 P. M. Central Standard Time, September 25, 1931, and that thereupon all its agencies ended, its employees, including attorneys, were discharged, and it was put, without exception or notice of appeal, beyond all further cor-
[fol. 71] porate activity, its existence was put to an end for

all purposes whatsoever, so that it can neither make nor take contracts, nor sue or be sued, and so that all debts to or from it became extinguished and all actions by and against it abated, and so that, as after death of a natural person, it can have no interest in the property theretofore by it controlled. That the defendant, Federal Surety Company, is, and since September 25, 1931, has been dissolved, and that its corporate existence is terminated, with the results hereinbefore determined. That E. W. Clark, receiver and/or liquidating officer of Federal Surety Company, is the successor to said corporation and as such holds title to all property owned by Federal Surety Company at the time it so ceased to exist."

On March 25, 1932, this action was commenced by Mieyr against the surety company and the receiver, Clark, in Cascade county, the complaint alleging a debt due plaintiff from the surety company, growing out of a policy of insurance for loss occasioned by reason of the ownership, maintenance, use and operation of a certain automobile. Mieyr in his complaint pleaded the decree of the Iowa court dissolving the corporation and appointing a receiver, and the Iowa laws authorizing the proceedings taken in the Iowa court. He alleged that the surety company had more than $50,000 worth of property situated in Montana, consisting of cash and a judgment in favor of the surety company; that Clark, the receiver, through agents and representatives in this state, is attempting to compromise, settle and discount the assets and procure possession thereof and remove them from the State, and that unless a receiver is appointed in this state to take charge of and preserve the property for the Montana creditors, the same would be dissipated and lost to the creditors; that the funds should be retained in Montana until the proportionate shares of the Montana Creditors is ascertained and determined and these paid out of the Montana assets before transferring any of the funds to the Iowa receiver. The complaint asked for the appointment of D. A. Critchton as receiver to take charge of the Montana assets and to hold the same until the further order of the court. It prayed also that plaintiff be decreed to have a valid claim against the surety company.

On the day the complaint was filed, the court appointed Crichton as receiver for the Montana property, the order reciting "that the receiver be vested with all the powers and [fol. 72] rights of receivers appointed by this court, and

with the power to take possession of all property heretobefore belonging to said Federal Surety Company of Davenport, Iowa, and to collect all sums owing said Federal Surety Company of Davenport, Iowa, and to keep and preserve the same, and manage and disburse the same, according to the further order of this court."

Crichton duly qualified as such receiver on March 26. Clark thereafter moved the court to discharge Crichton as receiver for want of jurisdiction in the court to make the appointment. This motion was denied on May 24, 1932.

On May 20, 1932, Harry O. Williard, W. W. Wheaton and C. W. Hay, as trustees of Gordon Campbell-Kevin Syndicate, a common law trust, and Gordon Campbell Syndicate, appellants here, obtained a judgment against the surety company in the Fergus county district court for approximately $15,000 without knowledge of the receivership proceedings in Iowa. This was after a second trial. The first resulted in a nonsuit, which judgement was reversed by this court in 91 Mont. 465, 8 Pac. (2d) 633. On May 24th these appellants appeared in this action in Cascade county by petition setting forth that they had discovered assets of the surety company within the state and had execution issued out of the district court of Fergus county upon their judgment and requested an order permitting them to levy the execution upon such property in Montana. The request was granted with the understanding, announced by the court, that no preference over other Montana creditors was given them. On July 25 Crichton filed his petition to annul the order permitting the levy of execution and gave notice that it would be heard on August 3.

On August 3 Clark served and filed an answer and cross-petition in this action. In substance it set forth his appointment as receiver by the Iowa court and pleaded the Iowa statutes authorizing the proceedings there taken; that creditors of the surety company reside in different jurisdictions and its assets are located in such jurisdictions; that there were assets in Montana amounting to $50,000 and that certain creditors were threatening suits against such property and issuing attachments, and that an ancillary receiver should be appointed to prevent irreparable damage and preferential treatment of some creditors over others. It prayed for an order confirming title to the assets of the [fol. 73] surety company in Clark and confirming the ap-

pointment of Crichton as ancillary receiver of the Montana property, with authority to care for and preserve it until the further order of the court. Mieyr filed an instrument admitting the allegations of the answer and cross-petition of Clark, and joining in the request therein made.

On August 25 the court entered an order or decree finding that the corporate existence of Federal Surety Company was terminated by the proceedings in Iowa and that title to all its property passed to Clark, as receiver, and should be distributed ratably to all creditors "subject to any liens and rights of creditors acquired on or prior to September 25, 1931, in or to specific property." It confirmed the appointment of Crichton as ancillary receiver, and directed that he receive proof of claims of all Montana creditors by requiring the claims to be filed with the clerk of court in Cascade county, and provided that when the claims allowed by order of the district court of Cascade county were allowed by the court in Iowa as entitled to share with other claims of similar rank, Crichton should transmit and remit to Clark all money and property in his hands as receiver, except such as were determined by the Cascade county court to be subject to specific liens, and such as was necessary to pay the costs of the proceedings in Montana, including the compensation of Crichton. It also provided that in the event claims allowed by the district court of Cascade county were not allowed in such manner as to permit claimants to share ratably with all other creditors of the surety company, then the money and property in the hands of Crichton should be retained by Crichton for distribution to creditors whose claims are allowed by order of the Cascade district court. The decree directed all persons to deliver to Crichton all money and property belonging to the surety company. It also revoked the order of May 24, 1932, granting permission to appellants to levy their execution. This appeal is from that decree or judgment, and from an order made thereafter denying appellants' motion to vacate or modify the decree.

The appeal presents the question whether appellants have the right to be paid the amount of their claim from the Montana property before any part of such property is transmitted to the Iowa receiver for administration through the Iowa receivership, when, as shown, their claim has been [fol. 74] reduced to judgment and execution levied after the

proceedings in the Iowa court designed to accomplish the dissolution of the corporation. Solution of the problem presented makes it necessary to determine the effect of the proceedings in the Iowa court upon the corporate life of the surety company.

The proceedings in Iowa were taken under section 8964 of the Iowa Codes of 1927 and 1931, which authorizes the commissioner of insurance to examine into the condition of corporations incorporated or doing business in that state. It then provides that when, upon such examination, he finds a stated condition, "he shall communicate the fact to the attorney general, who shall apply to the district court * * * for an order requiring the company to show cause why its business shall not be dissolved. The court or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it appears to its or his satisfaction that the assets and funds of said company are not sufficient, as aforesaid, or that the interest of the public requires it, it or he shall decree a dissolution of said company and a distribution of its effects and appoint a receiver therefor."

The Iowa supreme court has had occasion to pass upon the effect of proceedings under this statute, in the case of State ex rel. Attorney General v. Fidelity Loan & Trust Co., 113 Iowa, 439, 85 N. W. 638. The court in that case held that while the corporation had the right of appeal from a decree of dissolution, if the decree was acquiesced in and not appealed from, it became final and that "from the time of that entry the corporation has been dead, all its agencies ended, its employes, including attorneys, discharged; and it put, without exception or notice of appeal, beyond all future corporate activity. The effect was to 'put an end to its existence for all purposes whatsoever, and to destroy every one of its faculties so that thereafter it can neither make nor take contracts, nor sue or be sued, and so that all debts to or from it became extinguished, and all actions by and against it abated.'" * * * "To a corporation dissolution is as final as death to a person." This is the prevailing rule elsewhere (8 Fletcher, Enc. Corp., sec. 5564, note 41, and cases there cited.

Appellants contend that the order or decree of the Iowa court rendered on September 25, 1931, because of its word-

[fol. 75] ing did not terminate the existence of the surety company, but simply adjudged that at some future time it would be dissolved. From the record it appears that Clark was first appointed temporary receiver on September 11, and thereafter, upon the filing of amendments to the petition in the Iowa court, an order was made directing the surety company to show cause "why its business should not be forthwith dissolved and a receiver appointed to wind up its affairs." The decree that followed adjudged "that under and in accordance with the provisions of section 8964, of the Code of 1927, of the state of Iowa, the defendant Surety Company, shall be dissolved and its effects distributed."

Conceding that the decree of the Iowa court resulted in a present dissolution of the surety company, the question arises: Did the action brought by the appellants abate?

The following provision is found in section 6013, Revised Codes of 1921:

"Nor does the dissolution of any such corporation, take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which has been previously incurred."

This section has not be- construed by this court. Colorado has substantially the same legislative enactment. (Compiled Laws of Colorado 1921, sec. 2300.) Likewise the state of Illinois. (Sec. 14, Chapter 32, Hurd's Revised Statutes.) The simliar provisions noted have been construed by the supreme court of each of these states. The supreme court of Colorado, in the case of Kipp v. Miller, 47 Colo. 598, 108 Pac. 164, 135 A. S. R. 236), construing their statute, said:

"The question is, can the suit be maintained against the bank, it having been instituted after the expiration of the bank's charter? We answer in the affirmative, since the cause of action arose while the charter was still in force and the bank a going concern. The dissolution of the bank did not deprive creditors of a remedy against it, although sought to be applied after that time. The right of action by the creditor is clear and undisputed, and the remedy is preserved to him by express statute. Section 509, Mills' Ann. Stats., reads as follows: 'The dissolution for any cause whatever of corporations created as aforesaid, shall not take away or impair any remedy given against such [fol. 76] corporations, its stockholders, or officers, for any liabilities incurred previous to its dissolution.' "

That court reached the same result in the following cases construing the same statute: Steinhauer v. Colmar, 11 Colo. App. 494, 55 Pac. 293; Lucifer v. Buster, 64 Colo. 179, 171 Pac. 61; Dutton Co. v. Fitzpatrick, 69 Colo. 229, 193 Pac. 549. The same result was reached by the Circuit Court of Appeals for the eighth circuit construing the Colorado statute. (Hazard v. Park, 294 Fed. 40.)

The supreme court of Illinois, in the case of Singer & Talcott Co. v. Hutchinson 176 Ill. 48, 51 N. E. 622, construing the statute of that state, speaking with reference to a dissolved corporation, said:

"These sections, therefore, continue its life, for the respective periods stated, as an entity, so that it could sue or be sued as a party to the action, and therefore its rights, as such party, are conserved the same as the rights of other parties to actions."

Clearly, if the action of appellants were held to have abated upon the entry of a decree of dissolution by the Iowa court, their remedy, which accrued long prior thereto, would be impaired. "Impaired" means to make worse, to lessen the power, to weaken, to enfeeble, to deteriorate. (Ex parte Harrison, 212 Mo. 88, 110 S. W. 709.) The action, if against a domestic corporation, would not abate; and, as we shall presently see, the same rule is applicable to a foreign corporation.

The question of continuing actions by or against a corporation after its dissolution depends upon the laws of the state in which the action is pending, and a foreign statute relating thereto is of no avail. (1 C. J. 137; Sturges v. Vanderbilt, 73 N. Y. 384; Simmott v. Hamman, 141 N. Y. Supp. 505.)

Section 11 of Article XV of our Constitution provides:

"And no company or corporation formed under the laws of any other country, state or territory, shall have, or be allowed to exercise, or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state."

[fol. 77] Our legislature in 1917 enacted Chapter 149, now section 6659, Revised Codes 1921, as follows: "All foreign corporations licensed to do business in the state of Montana

shall be subject to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the laws of this state, and shall have no other or greater powers." Under the quoted section, when the surety company was licensed to do business in the state of Montana, it became subject to the liabilities and restrictions then imposed upon corporations of like character organized under the laws of this state. Suits against domestic corporations do not abate upon the entry of a decree of dissolution, and the same rule, by virtue of this statutory provision, must apply to a foreign corporation.

It is frequently said by the text writers and in decisions that the laws of the forum continuing the life of a corporation will not be extended to a foreign corporation dissolved under the laws of the state of its domicile. (8 Thompson on Corporations, sec. 6518.) But these statements all relate to statutes enacted with reference to the survival of domestic corporations after dissolution for purposes of suit. However, an examination of these authorities reveals the fact that no statute, either identical with or similar to section 6659, Revised Codes of 1921, was under consideration.

Many authorities are found in the books to the effect that a personal judgment cannot be obtained against a dissolved corporation, which is a correct statement of what might be termed the common-law rule. Substantially all the states now have survival statutes which enable actions to be maintained and judgments rendered against domestic corporations subsequent to dissolution, as is disclosed by the elaborate note in 47 A. L. R. 1397 et seq., wherein the statutory provisions and decisions of the respective states are collated.

We have searched in vain to find either of these rules applied in any jurisdiction having a statute similar to our own, above noted. Therefore we hold that the suit of appellants against the surety company did not abate on the entry of the decree of dissolution in Iowa, and that the judgment entered herein is good and valid.

[fol. 78] It then remains to determine whether the levy of the execution was valid. Solution of this question depends upon the effect of the order appointing Crichton receiver. Appellants contend that this appointment was a nullity, because the complaint of Mieyr is not sufficient upon which

to base the appointment of a receiver in this state. They assert that a receiver will not be appointed at the instance of a general contract creditor.

A general creditor of a corporation has no right to the appointment of a receiver. (Scholefield v. Merrill Mortuarries, 93 Mont. —, 17 Pac. (2d) 1081; Pomeroy's Equity Jurisprudence, 4th ed., sec. 1548, p. 3630; Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 37 L. Ed. 1113, 14 Sup. Ct. Rep. 127; French Bank Case, 53 Cal. 495; Smith v. Superior Court, 97 Cal. 348, 32 Pac. 322; State ex rel. Menzel v. District Court, 49 Nev. 145, 241 Pac. 317, 43 A. L. R. 1331.) It is sometimes said that courts on account of rapidly changing conditions in this country are gradually relaxing this rule: (Clark on Receivers, sec. 187, subd. a.) The reason for the relaxation of this rule is the result of statutory enactments, instead of the growth and change of judicial decisions.

The case of Brunner v. York Bridge Co., 78 W. Va. 702, 90 S. E. 233, 1 A. L. R. 643, holds that a creditor of a corporation may make application for the appointment of an ancillary receiver. The opinion in the case considers the right of a creditor to secure the appointment of a receiver as being axiomatic. Under the provisions of section 2286 of the West Virginia Statutes of 1906, in force at the time the decision was promulgated, the right to general creditors of corporations to secure the appointment of a receiver is expressly granted. The case of Popper v. Supreme Council etc., 70 N. Y. Supp. 637, is likewise based upon statutory authority for the appointment of receivers of both domestic and foreign corporations upon the application of a general creditor. An examination of the statutes of the various states reveals the fact that the legislatures thereof have from time to time increased the grounds for the appointment of receivers, and decisions from foreign jurisdictions must be read in the light of the existing statutes.

Our own Code, sections 9301 and 9303, enumerates the grounds for the appointment of receivers. Indentical stat- [fol. 79] utes obtain in California and Nevada. The California court, in the French Bank Cases, supra, said:

"But there is no statute of this state, none to which we have been pointed, which undertakes to confer upon a private person, either as stockholder or creditor, the right to maintain an action to dissolve a corporation upon the

ground that it is insolvent, or to obtain relief by seizing its property out of the hands of its constituted management, and placing it in the hands of a receiver."

The petition of the respondent Mieyr does not reveal that he occupied any other status than that of a general creditor of the Federal Surety Company.

A receiver will not be appointed unless the applicant has no other plain, speedy or adequate remedy. (Montana Ranches Co. v. Dolan, 53 Mont. 397, 164 Pac. 306.) The cause of action which Mieyr had against the Federal Surety Company, as disclosed by his complaint, was upon an express contract for the direct payment of money, and he had ample means to secure the payment of his indebtedness by obtaining the issuance and levy of a writ of attachment. (State ex rel. Nauman v. Pondera Valley State Bank, 77 Mont. 1, 248 Pac. 207; Jenkins v. First National Bank, 73 Mont. 110, 236 Pac. 1085; State ex rel. Barnett v. Reynolds, 68 Mont. 572, 220 Pac. 525.)

Mieyr had the right at the time he attempted to secure the appointment of a receiver, to attach the property of the Federal Surety Company in the state of Montana, unless the appointment of a receiver in Iowa would prevent the exercise of that right.

Even though it be conceded that the appointment of the receiver in the state of Iowa operated to transfer the property of the defunct surety company to him, such involuntary assignment in aid of a statutory judicial proceeding will not be recognized outside of the jurisdiction of the appointment, where the rights of domestic creditors are involved, if the receiver has not obtained possession of the property and where the creditors have obtained rights or liens upon the property even after the appointment in the foreign jurisdiction.

In Pomeroy's Equitable Remedies, section 1674, page 3896, 4th ed., it is said:

[fol. 80] "But where the receiver has not yet collected the fund or taken the property into his possession, and creditors or others have obtained rights or liens upon the property or fund in the state where it is situated, some distinctions must be observed. If the appointment of the receiver is involuntary, especially in aid of a statutory judicial proceeding, the prevailing doctrine seems to be that, where

the rights of domestic creditors are involved, the assignment will not be recognized outside of the jurisdiction of appointment."

The following authorities support the text quoted: Security Trust Co. v. Dodd, Mead & Co., 173 U. S. 624, 43 L. Ed. 835, 19 Sup. Ct. Rep. 545; Cole v. Cunningham, 133 U. S. 107, 129, 33 L. Ed. 538, 10 Sup. Ct. Rep. 269; Catlin v. Wilcox Silver Plate Co., 123 Ind. 477, 18 Am. St. Rep. 338, 8 L. R. A. 62, 24 N. E. 250; Gray v. Covert, 25 Ind. App. 561, 81 Am. St. Rep. 117, 58 N. E. 731; Ward v. Continental Pipe Co., 71 Conn. 345, 71 Am. St. Rep. 207, L. R. A. 706, 41 Atl. 1057; Gilbert v. Hewetson, 79 Minn. 326, 79 Am. St. Rep. 486, 82 N. W. 655.

When the transfer of a debtor's property is the result of a judicial proceeding, there is no provision of the Constitution which requires the courts of another state to carry it into effect, and as a general rule no state court will do this to the prejudice of the citizens of its own state (Reynolds v. Adden, 136 U. S. 348, 34 L. Ed. 360, 10 Sup. Ct. Rep. 843; Zacher v. Fidelity Trust Co., 106 Fed. 593).

The petition of Mieyr for the appointment of a receiver was insufficient, in that he, being a general creditor, had no right to the appointment of a receiver and had an adequate remedy by which he could be fully protected, namely, the issuance and levy of a writ of attachment.

The property of the Federal Surety Company within the state of Montana at the time of the levy of the execution by Williard et al., not being in possession of the Iowa receiver, was subject to levy, and the levy made under the execution in May, 1932, is good and valid.

The judgment and orders appealed from are reversed and the cause remanded for further proceedings in the district court in accordance with the views herein expressed.

[fol. 81] Mr. Justice ANGSTMAN, dissenting:

I am unable to concur in the views of my associates. The majority opinion concedes that the Iowa decree worked a present dissolution of the surety company. With this I agree, and shall discuss the remaining questions on that basis.

The majority opinion, so far as it holds that whether an action may be commenced or continued against a foreign

corporation after its dissolution by decree of the court of its domicile depends upon the laws of the state in which the action is pending, is in my opinion erroneous. I realize that there is dictum in some cases sustaining that view, and that a limited few cases so hold. The overwhelming weight of authority and the better-reasoned cases hold that whether a dissolved corporation is continued in existence for the purpose of maintaining or defending actions for a personal judgment, must be determined by the laws of its domicile, and that laws of the forum continuing the life of a corporation will not be extended to a foreign corporation dissolved by the laws of its domicile. (8 Thompson on Corporations, sec. 6518, note 7; Marion Phosphate Co. v. Perry, 74 Fed. 425, 33 L. R. A. 252; Kinsler v. Casualty Co. of America (Neb.), 172 N. W. 33; Remington v. Samana Bay Co., 140 Mass. 494, 5 N. E. 292; Fites v. National Life Assn. of Hartford, 130 Ala. 413, 30 So. 374; Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257, 71 L. Ed. 634; Riddell v. Rochester German Ins. Co., 35 R. I. 45, 85 Atl. 273; Hunt v Columbian Ins. Co., 55 Me. 290, 92 Am. Dec. 592; Mattson v. Kennecott Mines Co., 101 Wash. 12, 171 Pac. 1040; Harris-Woodbury Lumber Co. v. Coffin, 179 Fed. 257, affirmed in 187 Fed. 1005; Robinson v. Mutual Reserve Life Ins. Co., 182 Fed. 850; Martyne v. American Union Fire Ins. Co., 216 N. Y. 183, 110 N. E. 502; Atlantic Dredging Co. v. Beard, 130 N. Y. Supp. 4; Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 115 Minn. 491, 132 N. W. 992.)

The laws of Iowa do not continue the life of a corporation dissolved by decree of court. (State of Iowa v. Fidelity Loan & Trust Co., 113 Iowa 439, 85 N. W. 638.) No personal judgment could be taken against the surety company after its dissolution. (MacRae v. Kansas Piano Co., [fol. 82] 69 Kan. 457, 77 Pac. 94; First National Bank of Selma v. Colby, 21 Wall. 609, 22 L. Ed. 687; Combes v. Milwaukee & M. R. Co. (Wis.), 62 N. W. 89, 27 L. R. A. 369; Venable v. Granite Co., 135 Ga. 508, 69 S. E. 822, 32 L. R. A. (n. s.) 446; Oklahoma National Gas Co. v. Oklahoma, supra; Morgan v. New York B. & L. Assn. (Conn.), 46 Atl. 877; Grossman v. Vivienda Water Co. (Cal.) 89 Pac. 335; United States Trust Co. v. Pennsylvania Surety Co., 259 Mich. 442, 243 N. W. 311.)

When a corporation is dissolved according to the laws of its domicile, it becomes a dissolved corporation every-

where, dead in every other state as well as in the state of its domicile, and an action against such foreign corporation abates on its dissolution. (8 Thompson on Corporations, 3d ed., sec. 6518; 8 Fletcher Cyc. Corporations, secs. 5810, 8582.) The decree of the Iowa court dissolving the surety company is entitled to full faith and credit in this state on that issue. (Cogliano v. Furgeson, 245 Mass. 364, 139 N. E. 527; Morgan v. New York B. & L. Assn., supra; United States Trust Co. v. Pennsylvania Surety Co., supra.)

While there is a diversity of views on the question, the better reasoned cases hold that a judgment obtained against a corporation after its dissolution is void and subject to collateral attack. (Grossman v. Vivienda Water Co., supra; Newhall v. Western Zinc Min. Co. (Cal.), 128 Pac. 1040; Panzee Hamilton Co. v. Bray (Cal.), 274 Pac. 769; Remington v. Samana Bay Co., supra; Garrett v. Pilgrim Mines Co., 47 Idaho 595, 277 Pac. 567; Marion Phosphate Co. v. Perry, supra; 8 Thompson on Corporations, 2d ed., sec. 6519; 8 Fletcher Cyc. Corporations, sec. 5811; 7 R. C. L. 739.)

And while there is authority to the contrary, the weight of authority supports the view that "if a corporation is dissolved pending an action against it, the action abates by operation of law without any plea in abatement, so that no valid judgment can be rendered for or against it, and the objection can be raised at any time." (1 C. J. 135, and cases cited, including that of Pendleton v. Russell, 144 U. S. 640, 36 L. Ed. 574, 12 Sup. Ct. Rep. 746.)

Section 6013, Revised Codes 1921, is relied upon in the majority opinion. It provides, in part, that the dissolution [fol. 83] of any corporation does not "take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which has been previously incurred." Conceding for the purpose of this discussion only, that the laws of Montana determine whether the action of appellants abated upon the dissolution of the company in Iowa, this section would be of no avail to them. Obviously it has application only to domestic corporations. It is only domestic corporations that may be dissolved by action taken under this and the preceding sections.

Section 6659 is also relied upon. It provides that "all foreign corporations licensed to do business in the state

of Montana shall be subject to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the laws of this state, and shall have no other or greater powers." Its provisions, like those of section 6212, have no application to a corporation that has ceased to exist. (Robinson v. Mutual Reserve Life Ins. Co., 182 Fed. 850.) At most it is but a legislative declaration of the principle set forth in section 11 of Article XV of our Constitution. If section 6013 burdens a domestic corporation with life after its dissolution, the position of appellants in my opinion would not be affected by that fact. "The mere fact that a burden is placed upon domestic corporations from which foreign corporations are exempt does not operate to bring foreign corporations within the provisions of a law intended to apply solely to domestic corporations." (Uihlein v. Caplice Commercial Co., 39 Mont. 327, 102 Pac. 564.)

If there be merit in the claim that section 6013, when construed as applicable to domestic corporations only, has the effect of conferring greater rights and privileges upon foreign than upon domestic corporations, its utmost effect would be to condemn the statute as applied to domestic corporations, and this question could be raised only by a domestic corporation thus discriminated against. (Uihlein v. Caplice Commercial Co., supra.) But the effect of construing section 6013 as applicable only to domestic corporations does not give foreign corporations greater rights or privileges than domestic corporations. At most it places creditors of a domestic corporation in a different position than creditors of a foreign corporation. Its provisions [fol. 84] measure the rights and privileges of creditors, and not the corporation itself.

I fail to see, however, wherein it can be said that even domestic creditors of the surety company because formed and dissolved under the laws of Iowa, are not enjoying the same rights and privileges as they would if the corporation had been created and dissolved under the laws of this state. Had it been created under the laws of Montana and here dissolved, the remedy preserved to a creditor by section 6013, and section 6659 would be nothing more than the right to proceed to judgment and have the judgment allowed as a claim in the receivership proceedings to share pro rata with other creditors. (8 Thompson on Corporations, sec. 6324, note 65; 53 C. J. 124; Richle v. Margolies,

279 U. S. 218, 73 L. Ed. 669; Martyne v. American Fire Ins. Co., 216 N. Y. 183, 110 N. E. 502.) That right is preserved to appellants here without the necessity of proceeding to judgment, and the dissolution in Iowa without continuance of the corporate life does not deprive them of any remedy which would be accorded to a creditor of a dissolved domestic corporation under like circumstances.

It is my opinion that the judgment of appellants is a nullity and, in consequence, that no lien was obtained by virtue of the levy of execution. But if the judgment of appellants be regarded as valid, I am still unable to subscribe to the conclusion announced in the majority opinion.

I think the court is in error in holding that an ancillary receiver may not be appointed at the instance of a general creditor. Our statute provides that a receiver may be appointed in an action "by a creditor to subject any property or fund to his claim, * * * where it is shown that the property or fund is in danger of being lost, removed, or materially injured." (Sec. 9301, Rev. Codes 1921.)

The complaint here is on behalf of all creditors, and charges that the foreign receiver is removing the assets, and that unless a receiver be appointed, the funds would be dissipated and lost to the creditors.

We are here dealing with the appointment of an ancillary receiver in aid of the main receivership proceedings initiated in the Iowa courts. For the appointment of an ancillary receiver a creditor may make application. (53 C. J. 406; Popper v. Supreme Council etc., 70 N. Y. Supp. 637; Brunner v. York Bridge Co., 78 W. Va. 702, 90 S. E. [fol. 85] 233, 1 A. L. R. 643; Thornley v. J. C. Walsh Co., 200 Mass. 179, 86 N. E. 355.) "The better practice is for one who has an absolute right to sue in a foreign jurisdiction, such as a party to the original suit, or a creditor or a stockholder, to bring suit there, and ask for the appointment of an ancillary receiver." Clark on Receivers, sec. 318, subd. [a].) More particularly should this be the rule where, as here, the creditor, Mieyr, had confronting him the decree of the Iowa court adjudging that the corporation had been dissolved on September 21, 1931. This was sufficient basis upon which to justify the allegation made in his complaint that the property in this state was not subject to attachment or execution, dissolution has that effect, 8 Thompson on Corporations, sec. 6520), and to

justify the court in assuming jurisdiction to appoint the ancillary receiver on his application.

Nor does the case of Scholefield v. Merrill Mortuaries, 93 Mont. —, 17 Pac. (2d) 1081, militate against this view. In that case there had been no dissolution of the corporation, and no primary receiver appointed for the purpose of winding up the affairs of the corporation preliminary to dissolution. The primary receivership proceedings there involved did not look to the dissolution of the corporation, but had the effect of hindering and delaying creditors of a going concern. The proceedings in this state in that case were, as this court stated, "purely a matter of the appointment of a receiver pendente lite."

The fact that the assets had not yet come to the possession of the receiver when appellants made their levy, I think, is immaterial. The courts have the right to interfere summarily before property has passed to the possession of the receiver in order to aid the receiver in acquiring possession (53 C. J. 116). This is because the title of the receiver (8 Thompson on Corporations, sec. 6325) takes effect from the date of his appointment (Id., sec. 6326).

The trial court's function in a case of this kind was clearly expressed in Sands v. Greeley, 88 Fed. 132, 133, 31 C. C. A. 426, where the court said:

"When the administration extends over assets located in several jurisdictions, it is often convenient to apply, in advance, for the assistance of the different courts; hence the practice has become common of applying for auxiliary or ancillary appointments. When such an application is [fol. 86] made, the court to which it is addressed exercises its own original jurisdiction. The decree in the court of the domicile of the corporation is evidence in every other state that the corporation is insolvent, and that a proper case exists in that state for the appointment of a receiver, and it is to be respected accordingly, in obedience to the constitutional provision whereby full faith and credit is to be given in each state to the records and judicial proceedings of every other state in the Union. But it is for the court to which the application is made to decide what remedy it should extend in the particular case, and whether the proper administration of the assets requires the appointment of a receiver. Ordinarily, in comity to the proceeding of another court of co-ordinate jurisdiction, it will

appoint an ancillary receiver, and assume administration in aid of the primary receiver (Trust Co. v. Miller, 33 N. J. Eq. 155). When it appoints a receiver, the officer becomes its officer, and is completely amenable to its control, and it matters not whether he is called an ancillary receiver or merely a receiver. His title to the assets within the jurisdiction is derived from its decree, and does not depend upon comity. The assets are in its custody, and are to be disposed of as equity and the orderly administration of justice require. Its judgments and decrees in respect to these assets must be accepted as conclusive by all other courts. 'Where a receiver, administrator, or other custodian of an estate is appointed by the courts of one state, the courts of that state reserve to themselves full and exclusive jurisdiction over the assets of the estate, within the limits of the state' (Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464). It rests in the discretion of the court appointing the receiver whether the assets within its jurisdiction shall be distributed under its own direction or shall be transmitted to the primary receiver (United States v. Coxe, 18 How. 105, 15 L. Ed. 299). It is eminently proper that claimants residing within its jurisdiction should be relieved from the expense and inconvenience of proving their claims in other jurisdictions, and that provision should be made for securing to them equality of distribution in respect to the whole assets of the corporation; but there is no hard and fast rule to control the discretion of the court in making such distribution of the assets as shall be just to all creditors, and ultimately effect a ratable distribution of all the property of the cor- [fol. 87] poration (Buswell v. Supreme Sitting, 161 Mass. 224, 36 N. E. 1065, 23 L. R. A. 846; Baldwin v. Hosmer, 101 Mich. 119, 59 N. W. 432, 25 L. R. A. 739)."

Upon the appointment of the ancillary receiver the property was brought in the custody of the court and was not subject to execution (53 C. J. 131; 8 Thompson on Corporations, Ed. ed., sec. 6324). Nor does the fact that the court granted leave to make the levy alter the situation. That leave was granted only if Crichton's appointment should be revoked on appeal, and with the understanding that no preference over other creditors was given. The order granting leave was subsequently revoked.

The rule is that in the handling of the assets by the ancillary receiver "preference will be given to domestic creditors in the court appointing the ancillary administrator if it appears that there is danger of discrimination against them in the forum of the original receivership, but only so far as is necessary to counteract such discrimination. A court in which ancillary receivership is pending will protect the rights of the citizens of its own state and those of other states having claims which ought in equity to be brought under its own protection, and it may direct final distribution of the assets in its hands, but where there are no rights entitled to the particular protection of the ancillary court, it ordinarily will direct its receiver to turn over to the primary or domiciliary receiver the assets or funds in its hands after proper expenses of receivership have been taken out, and such turning over of funds rests ordinarily within the discretion of the ancillary court" (Clerk on Receivers, sec. 321, and cases cited).

Here the decree complained of makes ample provision to guarantee the local creditors freedom from discrimination as against the foreign creditors and assures the local creditors their ratable share of their claims with others of equal rank, as shown by the facts stated in the majority opinion, and that is all they are entitled to receive. (Brunner v. York Bridge Co., 78 W. Va. 702, 90 S. E. 233, 1 A. L. R. 643.)

In my opinion the judgment of the learned trial judge was correct and should be affirmed.

Albert H. Angstman, Associate Justice.

[fol. 88] IN SUPREME COURT OF MONTANA

7074

JOHN MIEYR, Respondent,

v.

FEDERAL SURETY COMPANY OF DAVENPORT, IOWA, a Corporation, et al., Respondents; D. A. Crichton, Ancillary Receiver, Respondent; Harry P. Williard et al., Appellants

JUDGMENT—April 1, 1933

This cause came on for decision and judgment. For reasons stated in the opinion, the judgment and orders

appealed from are reversed, and the cause remanded for further proceedings in accordance with the views expressed in the opinion. Opinion Per Curiam, concurred in by Mr. Chief Justice Callaway and Justices Matthews, Stewart and Anderson. Mr. Justice Angstman filed a dissenting opinion.

There being no further matter presented the court went into recess.

Lew. L. Callaway, Chief Justice.

Attest: J. W. Crosby, Clerk.

IN SUPREME COURT OF MONTANA

[Title omitted]

ORDER ON REHEARING—June 26, 1933

This cause came on regularly for hearing, upon respondents' motion for a rehearing, M. S. Gunn, Esq., and Loy J. Molumby, Esq., appearing as counsel for the respondents, and H. Leonard DeKalb, Esq., and Louis P. Donovan, Esq., appearing for the appellants. After argument by respective counsel the matter was submitted for decision.

There being no further matter presented the court went into recess.

Lew. L. Callaway, Chief Justice.

Attest: J. W. Crosby, Clerk.

[fol. 89] IN SUPREME COURT OF MONTANA

[Title omitted]

ORDER DENYING PETITIONER REHEARING—July 19, 1933

Respondents' motion for a rehearing is denied. Mr. Chief Justice Callaway and Mr. Justice Angstman, dissenting.

There being no further matter presented the court went into recess.

Lew. L. Callaway, Chief Justice.

Attest: J. W. Crosby, Clerk.

IN SUPREME COURT OF MONTANA

[Title omitted]

ORDER STAYING REMITTITUR OR MANDATE—Filed July 31, 1933

It appearing that E. W. Clark, as Receiver, one of the respondents above named, intends to make application to the Supreme Court of the United States for a writ of certiorari for the purpose of bringing before said Court for review the judgment of the above-entitled court in the above-entitled cause, and that there is reasonable ground for said application, upon motion of Gunn, Rasch, Hall & Gunn, Attorneys for said E. W. Clark, as Receiver, it is Ordered that the remittitur or mandate in said cause shall not issue, but shall be stayed until the 15th day of September, 1933, and that if on or before said date there is filed with the Clerk of this Court an affidavit of one of the attorneys for said E. W. Clark, as Receiver, showing that such application by proper petition for writ of certiorari has been made in compliance with the rules of the Supreme Court of the United States, that the said remittitur or mandate shall be stayed for a further period thereafter, and shall not issue before final disposition shall be made by the Supreme Court of the United States of said application or petition.

The stay hereby granted is upon the condition that there [fol. 90] be filed with the Clerk of this Court within 5 days from the date hereof a good and sufficient bond in the penal sum of $500.00, approved by one of the Justices of this Court, conditioned that if said application for such writ is not made on or before the 15th day of September, 1933, or if such application is not granted, or the said E. W. Clark, as Receiver, fails to make his plea good in the said Supreme Court of the United States, he will answer for all damages and costs which the appellants above named may sustain by reason of said stay.

Dated this 31st day of July, 1933.

Llewellyn L. Callaway, Chief Justice of the Supreme Court of the State of Montana.

[fol. 113] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 15, 1934

The petition herein for a writ of certiorari to the Supreme Court of the State of Montana is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

SEP 1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 361

E. W. CLARK,
COMMISSIONER OF INSURANCE OF THE STATE OF IOWA, AS RECEIVER OF FEDERAL SURETY COMPANY, PETITIONER,

vs.

HARRY O. WILLIARD, W. W. WHEATON, AND C. W. HAY,
AS TRUSTEES OF GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON-LAW TRUST, AND GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON-LAW TRUST, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA, AND BRIEF IN SUPPORT THEREOF.

REUEL B. COOK,
EDMOND M. COOK,
of Davenport, Iowa
M. S. GUNN,
of Helena, Montana
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No.

E. W. CLARK,
COMMISSIONER OF INSURANCE OF THE STATE OF IOWA, AS RECEIVER OF FEDERAL SURETY COMPANY, PETITIONER,

vs.

HARRY O. WILLIARD, W. W. WHEATON, AND C. W. HAY,
AS TRUSTEES OF GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON-LAW TRUST, AND GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON-LAW TRUST, RESPONDENTS.

SUMMARY
OF
PETITION AND BRIEF

This case has been previously considered here. See Clark v. Williard, 54 Sup. Ct. Rep. 615; 78 L. Ed. 743.

Petitioner asks that this Court again take jurisdiction and review the judgment (R. 21) of the Montana Supreme Court, handed down July 24, 1934, after remand from this Court. The grounds for such request are that the judgment fails to comply with the mandate of this Court and violates the faith and credit clause and the equal rights clause of the Constitution.

The controversy is whether Montana by policy expressed in statute or decision may refuse to recognize and give effect to the status of petitioner as charter liquidator of a dissolved Iowa corporation and the relationship prescribed by statutory

charter provisions between petitioner and the creditors of that defunct entity.

After petitioner became charter liquidator, respondents in Montana obtained a judgment by default against the dissolved corporation and levied execution.

The trial court held that the levy was ineffective. The Montana Supreme Court first upheld that levy on the ground that petitioner was a chancery receiver. This Court reviewed that decision and held that petitioner is a charter liquidator and that full faith and credit had not been given to the Iowa statutory charter provisions. After remand, the Montana court again upheld the levy. Review is sought of the latter judgment.

The latter judgment is grounded on the proposition that the recognition of the statutory charter provisions would be repugnant to Montana policy as to a dissolved corporation and its property.

The court says that Montana statutory policy will not permit appointment of a corporate receiver to prevent unequal distribution. Petitioner contends that that policy is immaterial. Petitioner is a liquidator. The Constitution compels recognition of that fact.

The court says Montana policy permits attachment against dissolved Montana corporations. Petitioner contends that that policy is immaterial. That policy could only prevail prior to the appointment of a receiver or liquidator. The liquidator in this case is in office and entitled to recognition.

The court says petitioner's title results from a statutory assignment and is not entitled to recognition by constitutional mandate because rights and remedies of property are governed by the laws of the state in which it is situate. Conceding that Montana law may determine the rights of a liquidator to property just as it might determine the rights of a surviving spouse to property, yet Montana may not deny that petitioner is a charter liquidator any more than it could deny that a surviving spouse from another state had been validly married under the law of the marital domicile.

In any event this same point was an alternative ground of the first decision. It should not be presumed that this Court

reversed the first decision merely for the purpose of permitting the Montana court on the second hearing to place the decision solely upon what had been an alternative ground of the first decision.

The opinion recognizes that a corporate receiver will be appointed in Montana in some cases. The judgment decides that a receiver will be protected against execution levies. The judgment also decides that petitioner's status does not entitle him to protection in Montana.

If Montana would not protect a charter liquidator with title, then it might be proper to assume (although we do not concede) that they could treat petitioner likewise. But they admittedly protect a Montana liquidator. They refuse to protect a liquidator from another state. In effect they say that in Montana petitioner is not a liquidator. Either they have withheld faith and credit or have indulged in a forbidden discrimination between a Montana liquidator and a liquidator appointed in another state.

The violation of the Constitution and mandate is not mitigated or avoided by the last conclusion of the opinion that the Iowa court would do likewise. If the Iowa court would so hold, it would be subject to review and correction. Nor is it clear that court would so hold. The Schloss case, decided by the Iowa court and relied on in the opinion, arose on demurrer. It does not appear that the constitutional questions were ever raised or considered. The Montana judgment and opinion either do or do not violate the mandate of this Court and the Constitution. A violation is no less a violation because some other court would be disposed to do likewise.

There are adequate grounds for review. Failure to comply with the mandate of this Court is ground for review. The constitutional questions are in the record. They were either specially set up in the trial court (R. 87) or result from an interpretation of Montana statutes the validity and constitutionality of which were considered and upheld.

PETITION

To The Honorable The Chief Justice and The Associate Justices of The Supreme Court of The United States:

Your petitioner respectfully represents as follows:

The facts appear in the several opinions. We considered omitting any extended statement of facts but concluded that the rules require such a statement, which now follows.

Petitioner, Commissioner of the Department of Insurance of the State of Iowa, was appointed statutory successor and charter liquidator of Federal Surety Company, an Iowa insurance corporation, by a decree (R. 45) and supplemental decree (R. 50) in a statutory proceeding in the courts of Iowa. Pertinent Iowa statutes are in the Appendix hereto and in the supplemental decree at R. 50.

When petitioner was appointed an action was pending in Fergus County, Montana, in which Federal Surety Company (not petitioner) was defendant, and in which, after petitioner was appointed, respondents obtained judgment by default against Federal Surety Company (not against petitioner). (R. 84). Execution was issued (R. 86). The levy complained of was made under that judgment in May, 1932, after petitioner's appointment. See affidavit at R. 68 in support of respondent's motion. These parties met in a third court—the District Court, Cascade County, Montana. After petitioner's appointment, but prior to the levy, that court upon petition of a simple contract creditor (Mieyr) had appointed a receiver (Crichton) of the Montana assets (R. 32). Thereafter respondents appeared in that proceeding and asked (R. 35) and obtained (R. 37) an order granting leave to levy execution under their judgment, subject, however, to the conditions enumerated at R. 36. The levy was made. Thereafter petitioner appeared in that same proceeding, set up his status and the Iowa statutes from which it was derived, and asked (R. 39 to 56) and obtained an order (R. 58 to 63) recognizing his status and his title, making provision assuring Montana residents of distribution ratably with all other creditors, confirming the appointment of Crichton as receiver, and revoking the leave theretofore granted to respondents to levy execution.

Respondents moved (R. 63 to 86) to set aside that order. Petitioner resisted that motion on the ground (R. 87) that to sustain the motion would be in violation of Sections 1 and 2, Article IV, of the United States Constitution. From an order (R. 89) overruling their motion respondents appealed to the Montana Supreme Court, which reversed the trial court and upheld the execution levy on the grounds (see first opinion, R. 92): (1) that it was error to appoint Crichton upon the petition of a simple contract creditor; (2) that the appointment of Crichton on petitioner's application was not made until after the levy; (3) that petitioner's appointment in Iowa was a chancery appointment, good only in the state where made; and (4) that even though petitioner did derive title from Iowa statutes, an involuntary assignment in aid of a statutory judicial proceeding will not be recognized in another state to the prejudice of its citizens. See first opinion (R. 92).

This Court reviewed that decision, vacated the Montana judgment insofar as it upheld the execution levy, and remanded the case. (Clark v. Williard, 78 L. Ed. 743; 54 Sup. Ct. Rep. 615.) This Court held that petitioner derived his status as charter liquidator with title from Iowa statutory charter provisions to which the Montana court had failed to give full faith and credit. In the opinion of this Court it is said:

> "In our judgment, the statutes of Iowa have made the official liquidator the successor to the corporation, and not a mere receiver * * * .
>
> "We think the Supreme Court of Montana denied full faith and credit to the statutes and judicial proceedings of Iowa in holding, as it did, that the petitioner was a receiver deriving title through a judicial proceeding, and not through the charter of its being * * * .
>
> "Whether there is in Montana a local policy, expressed in statute or decision, whereby judgments and attachments have a preference over the title of a charter liquidator, is a question as to which the Supreme Court of that state will speak with ultimate authority. It has not spoken yet."

This passage was evidently construed by the Montana court to mean that it might decide the policy of Montana as to for-

eign liquidators without reference to the status of domestic liquidators. It should be noted that that passage does not have such a meaning. The omission of the word "foreign" before the words charter liquidator is very significant and indicates that this Court intended that the Montana court decide the policy as to liquidators generally, both domestic and foreign, and deal with both in a similar manner.

The judgment entered by the Montana court appears at R. 21, in the following words:

> "This cause this day came on for judgment and decision. Whereupon, on consideration it is now here ordered and adjudged by this Court that the cause be, and it is hereby remanded to the district court of Cascade county with direction to modify the order of August 25, 1932, to the end that the lien of the appellants acquired by virtue of the levy of the execution is determined to be valid as against and prior to the claim of the respondent Clark, and of the receiver appointed by the district court; that the claim of the respondent Clark, and of the receiver so appointed, is superior to the claim of all persons attempting to assert a lien on the assets of the Federal Surety Company which was not perfected prior to August 3, 1932. The order of August 25, 1932, will when so modified, stand affirmed."

That judgment settles two issues: (1) Montana policy does recognize a Montana receiver or liquidator and protect him against executions. (2) Montana policy will not recognize or give effect to the status of a charter liquidator appointed in another state.

The Montana court has refused to recognize and give effect to the status and title of petitioner. They say in effect that in Montana petitioner is not a liquidator. Either they have withheld full faith and credit or have indulged in a forbidden discrimination between a Montana liquidator and a liquidator appointed in another state.

The same objections apply to the opinion; if not, then the opinion must be disregarded as contrary to the judgment. In its opinion the Montana court addresses itself to the question of policy. It says that the policy of Montana permits levies against a foreign liquidator. It derives that policy from Mon-

tana statutes. It interprets Section 6011, Revised Codes of Montana, 1921, to mean that under Section 9303, Id., a receiver may not be appointed for the sole purpose of preventing execution levies and enforcing ratable distribution. At the bottom of R. 9 the opinion states:

> "We therefore conclude that the courts of this state will not appoint a receiver to supplant the statutory trustees of a dissolved insolvent corporation upon the sole and only ground of preventing the unequal distribution of its assets."

and at the end of the second paragraph on R. 11 the opinion continues:

> "The legislature has by the all-inclusive attachment laws made them applicable to all persons and corporations (except banking corporations) alike, without regard to the solvency or insolvency of the attachment debtors. The legislature has spoken; it has declared the policy of the state, which is binding upon us."

The question is not on what grounds a liquidator will be appointed, nor whether levies are permitted against an insolvent corporation for which no liquidator has been appointed. Petitioner has been appointed and is in office. The opinion concedes, and the Montana statutes provide, that a receiver may be appointed in some cases. The judgment upholds and protects the appointment (after respondents' levy) of Crichton in this case. This Court has said Montana must recognize that petitioner is in office. Montana must treat petitioner as liquidator. It is immaterial what Montana would do about appointments or levies if petitioner were not in office.

The opinion then passes to the question, what faith and credit must be given to the statutes of Iowa from which petitioner's title and status are derived. The opinion states (R. 11):

> "Full faith and credit must be given to the decree of the Iowa court and the statutes of that state in this respect, that Clark was entitled to the property, not as an ordinary receiver, but as a quasi-assignee of the dissolved corporation by force of statute entitled of right to defend or sue in its

> stead in this state. (Citation) But the laws of the state of Iowa do not have extraterritorial force. Rights and remedies of property are governed by the laws of the state in which it is situate. The statutory assignment can only be given force in other states on the ground of comity, not by constitutional mandate."

The Montana court says this is a controversy over rights and remedies of property. Petitioner contends this is a controversy over a status traceable to the laws which created the corporation.

The prior decision of this Court (Clark v. Williard), read in the light of the decision there reversed, renders untenable the quoted proposition that rights and remedies of property can be the basis for denying full faith and credit or denying equal protection of the laws. In its first opinion the Montana court, after deciding that petitioner was a chancery receiver, endeavored to settle the controversy conclusively with a statement that even though the Iowa proceedings did vest petitioner with title, " * * such involuntary assignment in aid of a statutory judicial proceeding will not be recognized outside of the jurisdiction of the appointment * * ." (R. 102). The reversal of the first decision indicates that the proposition is not tenable. It should not be said that this Court reversed the former decision merely to permit the Montana court to repeat as a ground of a new decision that which had been an alternative ground of the reversed decision.

Assuming that this is a controversy over rights and remedies of property, no citation of authority is necessary to demonstrate that the control of property is restricted by constitutional mandate. The sovereign right of eminent domain must be exercised agreeably to the due process clause. The sovereign power to regulate nonresident ownership of property is restricted by the equal protection clause.

However, the subject-matter, the ultimate issue herein, is not "rights and remedies of property," but is the status of the charter liquidator of a dissolved insolvent Iowa corporation and the relationship or status as between that defunct entity and its charter successor, on the one hand, and all its creditors, on the other hand. That status or relationship is controlled by the Iowa statutory charter provisions. Of those charter pro-

visions certain truths are evident. They were the organic law of the corporate existence. The corporation had and could have no powers independently or in excess of them. They were carried with the corporation wherever it transacted business. Respondents were put on notice of and acceded to them. The charter provisions and any status or relationship created by them must be recognized and enforced by all other states.

This Court, in Converse v. Hamilton, 224 U. S. 243, 56 L. Ed. 749, considered the proposition that Wisconsin need not enforce a Minnesota statutory stockholder's liability that was contrary to Wisconsin policy. This Court, speaking through Justice Van Devanter, said:

> "The subject to which Chapter 272 (Minnesota statutes) is addressed is peculiarly within the regulatory power of the State of Minnesota; so much so that no other state properly can be said to have any public policy thereon. And what the law of Wisconsin may be respecting the relative rights and obligations of creditors and stockholders of corporations of its creation, and the mode and means of enforcing them, is apart from the question under consideration."

Any Montana law or policy is unconstitutional to the extent that it is invoked to deny faith and credit or equal protection to a status which is and can only be traceable to the laws of another state.

There is no reasonable distinction between the reserved sovereign power of Montana to control its courts and the power to control property within its borders. If rights and remedies of property are not subject to constitutional mandate and are permitted to determine the status of petitioner and of the respondents herein, it follows that the Wisconsin court in the Converse case, after rendering judgment in favor of the Minnesota receiver, could have refused to enforce the judgment because it contravened Wisconsin policy as to property. The power of Wisconsin to control its courts was not permitted to override the status of a Minnesota statutory receiver and the relation between him and a stockholder of the defunct Minnesota corporation. By the same token the power of Montana to control property should not be permitted to override the status of petitioner and his relationship to all the creditors of

the defunct Iowa corporation.

Analogy to the marital status is in point. (Atherton v. Atherton, 181 U. S. 155; 45 L. Ed. 794.) Let it be supposed that the Iowa law grants and the Montana law denies to persons within a certain degree of relationship the right to contract a lawful marriage, and that persons within that degree, domiciled in Iowa, are there married. Let it be supposed that the husband dies seized of property in Montana, where the widow's rights are contested on the ground that it is contrary to Montana policy to permit property to pass to one as a widow if she bore to her husband a blood relationship which would have prevented a lawful marriage had the parties been domiciled in Montana. A decision so holding would clearly deny full faith and credit to the laws under which the marital status became fixed and would in effect say that she is a widow in Iowa but not in Montana. Montana property laws might determine the right of a widow in property there located. The question whether an Iowa resident under those circumstances is a widow would not be open to Montana to decide. Montana could not accomplish that result by the subterfuge of applying Montana property laws or policy. The property laws cannot be permitted to deny the existence of a status over which Montana has no control.

Likewise as to statutes and decrees in Iowa dissolving the marital status of persons domiciled in Iowa. An Iowa decree agreeable to Iowa law dissolving the marriage of Iowa citizens must be recognized in Montana even though Montana would not on the same grounds have dissolved a marriage between persons domiciled in Montana. The full faith and credit clause would prevent the courts of Montana from denying that the parties had been divorced. If the divorced husband died owning property in Montana, the survivor should not be permitted to there inherit as a widow. Yet, if the reasoning complained of in the instant case is upheld, the Montana court in the divorce situation would say that the matter being one of rights and remedies of property, the survivor should be permitted to inherit because to do otherwise would be against Montana policy.

Montana may determine the rights of a liquidator to property, but the question whether petitioner is a liquidator is not open. The property laws of Montana can only be enforced

with full recognition that petitioner is a liquidator. The status of petitioner and the relationship between petitioner and the creditors of the defunct Iowa corporation must be determined from the Iowa law and cannot be contravened under the guise of property regulation any more than the marital status of persons domiciled in other states.

The foregoing is not limited by the proposition that Montana would not be compelled to recognize statutes and decrees of other states purporting to fix the marital status of persons domiciled in Montana. (Andrews v. Andrews, 188 U. S. 15; 47 L. Ed. 366.) In the instant case the corporation never became a citizen of Montana. Its admission to Montana did not domesticate it there or change its organic law. In the words of Chief Justice Marshall, the corporation was "precisely what the incorporating act has made it."

Respondents had notice of that incorporating act and are bound by the status created by that act, and cannot successfully invoke the laws of any other state to change or alter that status, which was peculiarly within the power of the incorporating state.

If Montana would not protect a Montana charter liquidator from execution levies, then it might be possible (although we do not so concede) to present a theory on which they could recognize the status of a charter liquidator from another state and still refuse to protect him. Under those circumstances they would be treating alike both domestic and foreign liquidators. However, they admittedly protect a Montana liquidator and refuse to protect a liquidator from another state. In effect they say that in Montana petitioner is not a liquidator. They refuse to give faith and credit to the statutes creating a status over which Montana has no control. They have violated the mandate of this Court. If it be said that Montana has recognized the status, then it has so construed and upheld the constitutionality of statutes as to bring about a discrimination between a Montana liquidator and a liquidator appointed in another state, all in violation of Section 2 of Article IV and Section 1 of Amendment XIV.

The violation of the Constitution and mandate of this Court is not mitigated or avoided by the conclusion that the Iowa courts would do likewise. The Montana court's opinion con-

siders the case of Schloss vs. Metropolitan Surety Co., 149 Iowa 382, 128 N. W. 384, and says (R. 14):

> "If the dissolved corporation were in Montana, and a statutory liquidator appointed in Montana under statutes identical with those of Iowa were making a like claim as against an attaching creditor under like circumstances, the Iowa courts under their established rules of decision would decline to accord the liquidator the right to secure priority over the attaching creditor. We, therefore, conclude that the liquidator from Iowa is entitled to receive no more consideration at the hands of our courts than would our citizens under like circumstances in theirs."

That Schloss case arose on demurrer. It does not appear that the New York statutes were pleaded or that the constitutional questions were ever raised or considered. But if they were, and if the decision goes to the extent claimed for it, nevertheless that case should have been reversed had it been brought here.

This last proposition neither adds to nor detracts from the strength of the Montana decision. The Montana judgment and the opinion either do or do not violate the mandate of this Court and the Constitution. A violation is no less so because some other court would be disposed to do likewise.

The record presents adequate grounds for review. Failure to comply with the mandate of this Court is ground for review. The constitutional questions are in the record. They were specially set up in the trial court (R. 87) or result from an interpretation of Montana statutes the validity and constitutionality of which were considered and upheld and which as interpreted are repugnant to the Constitution.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Petitioner claims that the Montana Supreme Court erred both in its opinion and in its judgment in several respects, and specifies the following errors:

1. The judgment and opinion failed and refused to obey,

and have ruled and adjudged contrary to, the mandate of this Court.

2. The judgment and opinion deny full faith and credit to the statutes of the State of Iowa which were part of the corporate charter of Federal Surety Company, and to the decrees entered in the State of Iowa agreeably thereto, and therefore violate Section 1, Article IV, of the United States Constitution, in that:

   a. They hold that said statutes and decrees, and the status created pursuant thereto, are not entitled to recognition by constitutional mandate.

   b. They hold that in Montana petitioner is not a charter liquidator entitled to be protected against execution levies.

   c. They fail and refuse to regard the dissolution of Federal Surety Company as effective in Montana and to regard petitioner as successor to said corporation and the holder of title to its property.

3. The judgment and opinion violate Section 2, Article IV, and Section 1, Amendment XIV, of the Constitution of the United States, in that they uphold the constitutionality (which was drawn in question) of Montana statutes interpreted as establishing a policy which prevents recognition and protection against execution levies of a charter liquidator appointed in another state, notwithstanding that the courts of Montana will appoint receivers and liquidators and protect them against execution levies.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the Seal of this Honorable Court, directed to the Supreme Court of the State of Montana, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cause in which said decision and judgment complained of was rendered, designated on its docket as Cause No. 7074, and that said decision and judgment may be reversed by this Honorable Court, and that your petitioner

may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

REUEL B. COOK,
EDMOND M. COOK,
M. S. GUNN,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

The opinion and judgment of which review is sought were rendered July 24, 1934, and have not been published in the Montana Reports or the Pacific Reporter. See majority opinion, R. 5 to 15. See dissenting opinions, R. 15 and R. 18.

JURISDICTION

Jurisdiction to issue the writ is conferred by Subdivision (b) of Section 237 of the Judicial Code as Amended by Act of February 13, 1925.

The date of the judgment to be reviewed is July 24, 1934 (R. 21).

Issuance of the writ is sought on the ground that the opinion and judgment of the Montana Supreme Court violate the mandate of this Court and violate Sections 1 and 2 of Article IV, and Section 1, Amendment XIV, in the respects noted in the reasons relied upon for the writ, which are, specifically: (1) The holding that in Montana petitioner is not a charter liquidator entitled to protection against execution levies violates the mandate of this Court and denies full faith and credit to the Iowa statutes and decrees. (2) The holding that a charter liquidator appointed in another state is not entitled to protection against execution levies, when domestic receivers and liquidators are appointed and so protected, denies the equal protection of the laws to the foreign liquidator.

STATEMENT OF THE CASE

In the interest of brevity reference is made to the statement of the case set out in the petition to which this brief is attached and the summary thereof inserted at the beginning of the petition.

SPECIFICATION OF ERRORS

Petitioner will rely upon all the assigned errors which are set forth at Pages 12 and 13 of the petition to which this brief is attached, and which, briefly stated, assert that the Mon-

tana court has:

1. Violated the mandate of this Court;
2. Denied full faith and credit to the Iowa statutes and decrees;
3. Denied to this petitioner the equal protection of the laws.

POINTS AND AUTHORITIES RELIED UPON

I. Failure of a court, the decision of which has been reviewed by this Court, to obey the mandate of this Court is ground for a second review.

> In re Blake, 175 U. S. 114; 44 L. Ed. 94.
> Blake v. McClung, 176 U. S. 59; 44 L. Ed. 371.
> Stanley v. Schwalby, 162 U. S. 257, 279; 40 L. Ed. 960, 968.

II. The effect in Iowa of its statutes and decrees is to constitute petitioner a receiver or liquidating officer.

> Clark v. Williard, 78 L. Ed. 743; 54 Sup. Ct. Rep. 615.

III. The statutes of Iowa were the law of the corporate existence and were impliedly acceded to by all who dealt with the corporation.

> Relfe v. Rundle, 103 U. S. 222; 26 L. Ed. 337.
> Mumma v. Potomac Co., 8 Pet. 284; 8 L. Ed. 945.
> Bank of Augusta v. Earle, 13 Pet. 519; 10 L. Ed. 274.

IV. The organic law of the corporation not only governs its existence but is wholly within the legislative power which created the corporation.

> Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257; 71 L. Ed. 634.
> Pendleton v. Russell, 144 U. S. 640; 36 L. Ed. 574.
> Morgan v. New York Nat. Bldg. & Loan Assn., 73 Conn. 151; 46 Atl. 877.

V. Statutory provisions of a corporate charter must be given recognition in states other than that of domicile as a matter of right and not merely by comity.

Converse v. Hamilton, 224 U. S. 243; 56 L. Ed. 749.

Relfe v. Rundle, 103 U. S. 222; 26 L. Ed. 337.

VI. The Iowa statutes must in Montana be given the same effect that they have in Iowa, and that effect cannot be avoided on the ground that to do so is repugnant to Montana policy.

Converse v. Hamilton, 224 U. S. 243; 56 L. Ed. 749.

Hancock National Bank v. Farnum, 176 U. S. 640; 44 L. Ed. 619.

Roche v. McDonald, 275 U. S. 449; 72 L. Ed. 365.

CONCLUSION

Petitioner considers the foregoing points as so clearly established that elaboration thereof would constitute an undue extension of this brief and an imposition upon the Court.

The previous history of this case has finally confined the issue within a narrow compass. Petitioner's status is fixed. This Court has decided that his status is derived from Iowa statutes. The courts of Montana say that petitioner's status, though traceable to Iowa statutes, is not entitled to recognition in Montana. Does the Constitution compel them to say otherwise?

Petitioner believes the principles he relies upon are sound and that the conclusion contended for is not a departure from established authority, but results from the natural extension or application of propositions heretofore decided.

Respectfully submitted,

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M. S. GUNN,

Counsel for Petitioner.

APPENDIX.

Statutes.

Judicial Code, Section 237, as Amended by Act of February 13, 1925.

(*a*) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

(*b*) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding para-

graph be an obstacle to granting a review on certiorari under this paragraph.

(c) If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed: PROVIDED, That where in such a case there appears to be no reasonable ground for granting a petition for certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs, as provided in section 878 of this title.

Section 8402, *Code of Iowa,* 1927 *and* 1931, *Being Also Section* 1640 *of the Code of Iowa,* 1897.

Courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, and to appoint a receiver therefor, who shall be a resident of the State of Iowa. An action therefor may be instituted by the attorney general in the name of the state, reserving, however, to the stockholders and creditors all rights now possessed by them.

Section 8964, *Code of Iowa,* 1927 *and* 1931, *Being Also Section* 1731 *of the Code of Iowa,* 1897.

The commissioner of insurance shall, when he finds it expedient, appoint one or more persons, not officers, agents, or stockholders of any insurance company doing business in the state, to examine into the affairs and condition of any such company incorporated or doing business therein, or make such examination himself, and the officers or agents thereof shall produce their books for the inspection of the examiners and otherwise assist therein, so far as they can do so; and in conducting the investigation they may examine under oath the officers or agents of any company, or others, relative to the business and condition of the company, and the result thereof shall be published in one or more papers in the state, when the commissioner believes the public interest requires it. When

it appears to the commissioner from such examination that the assets and funds of any company incorporated in this state are reduced or impaired by its liabilities, as defined under the head of liabilities in the statement required by this chapter, more than twenty per cent below the paid-up capital stock required, he shall direct the officers thereof to require the stockholders to pay in the amount of such deficiency within such a period as he may designate in such requisition, or he shall communicate the fact to the attorney general, who shall apply to the district court, or if in vacation to one of the judges thereof, for an order requiring the company to show cause why its business shall not be dissolved. The court or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it appears to its or his satisfaction that the assets and funds of said company are not sufficient, as aforesaid, or that the interest of the public requires it, it or he shall decree a dissolution of said company and a distribution of its effects, and appoint a receiver therefor. The application of the attorney general may be by the court or judge sent to a referee to inquire into and report upon the facts stated therein, which report shall be made to the court or judge.

Section 8613-c1, *Code of Iowa,* 1931, *Being Chapter* 233 *of the Acts of the* 43*rd General Assembly of Iowa.*

The commissioner of insurance henceforth shall be the receiver and or liquidating officer for any insurance company, association or insurance carrier, and shall serve without compensation other than his stated compensation as commissioner of insurance, but he shall be allowed clerical and other expenses necessary for the conduct of such receivership.

Section 6011, *Revised Codes of Montana,* 1921.

6011. Directors to be trustees for creditors upon dissolution of corporation—Dissolution by limitation—Record of names of trustees. Unless other persons are appointed by the court, the directors of any corporation, at the time of its dissolution by expiration of its charter or otherwise, are trustees of the creditors and stockholders or members of such corporation, and have full power to settle and liquidate its affairs, and such trustees, or a majority thereof, or in case

of the death of one or more of such trustees, a majority of such survivors, are authorized to execute grants and conveyances of both real and personal property of such dissolved corporation. Every such grant or conveyance shall be prima facie evidence of the truth of all matters and facts recited or stated therein.

Where a corporation is dissolved by the expiration of the time limited by its charter, the president, or vice-president, and the secretary of the corporation in office at the date of its dissolution, may at any time thereafter make out, under oath, a statement giving the names of directors of the company at time of such dissolution, which statement shall be entitled to record in the office of the county clerk and recorder of any county of the state of Montana, and the directors therein named shall be, prima facie, the trustees of such dissolved corporation.

Section 9256, *Revised Codes of Montana*, 1921.

9256. When attachment may issue. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as in this chapter provided, as follows:

In an action upon a contract, express or implied, for the direct payment of money, where the contract is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless.

Section 9301, *Revised Codes of Montana*, 1921.

9301. Appointment of receiver. A receiver may be appointed by the court in which an action is pending, or by the judge thereof:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the

property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured;

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt;

3. After judgment, to carry the judgment into effect;

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

5. In cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.

Section 9303, *Revised Codes of Montana,* 1921.

9303. Appointment of receivers upon dissolution of corporations. Upon the dissolution of any corporation, the district court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 361

E. W. CLARK,

COMMISSIONER OF INSURANCE OF THE STATE OF IOWA, AS RECEIVER OF FEDERAL SURETY COMPANY, PETITIONER,

vs.

HARRY O. WILLIARD, W. W. WHEATON, AND C. W. HAY,

AS TRUSTEES OF GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON-LAW TRUST, AND GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON-LAW TRUST, RESPONDENTS.

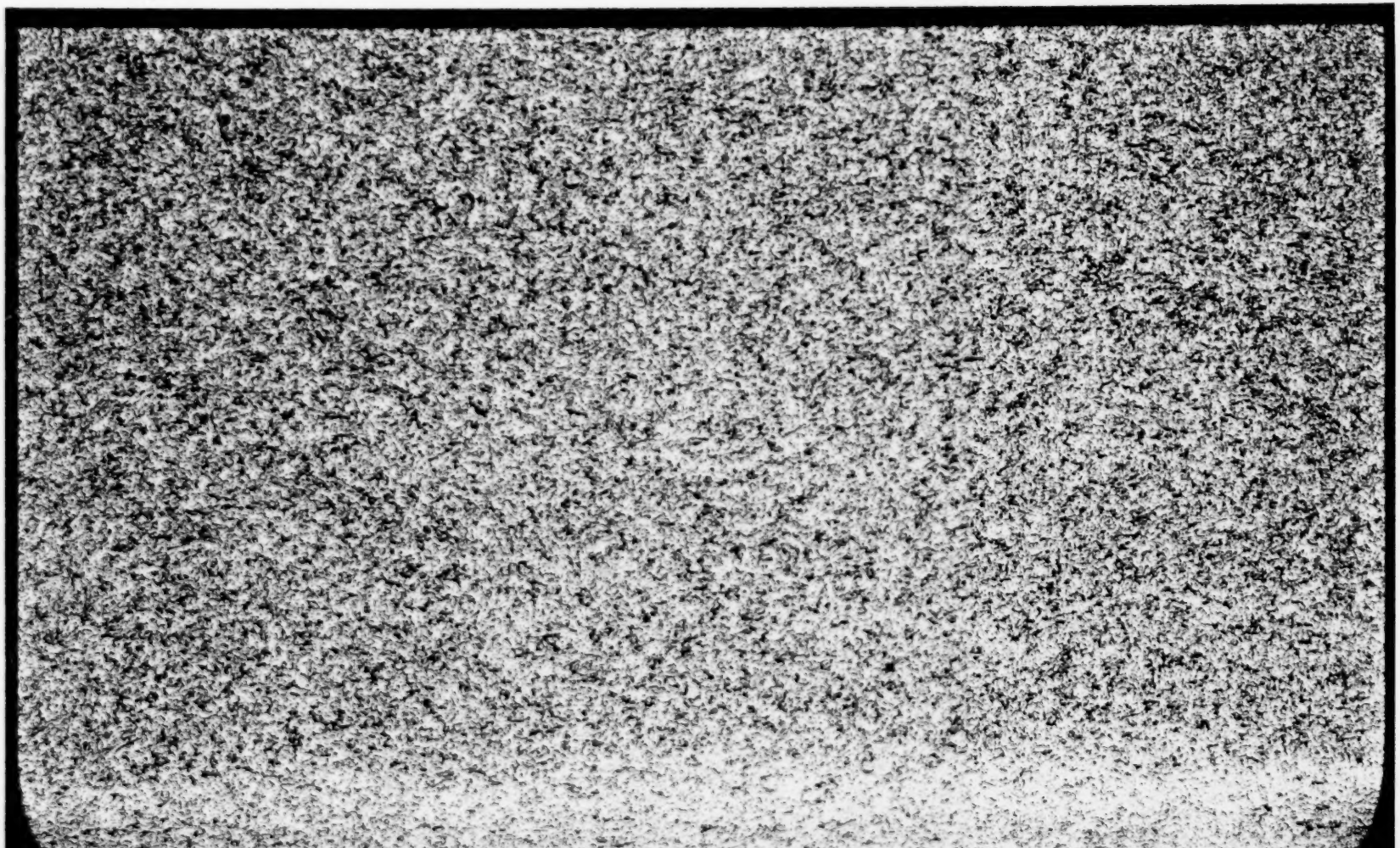
PETITIONER'S REPLY

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

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AS TRUSTEES OF GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON-LAW TRUST, AND GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON-LAW TRUST, RESPONDENTS.

PETITIONER'S REPLY

FOREWORD.

Petitioner has stood upon his petition and brief in support thereof and has not filed a supplemental brief. This brief is in reply to respondents' two briefs, viz., the one filed in resistance to the petition, and the separate supplemental brief served on petitioner's counsel December 27, 1934.

The burden is on respondents to uphold the execution levy through which they seek other than ratable distribution.

They seek to satisfy that burden by the contention that this is a controversy over property in Montana, control of which they say is free from constitutional mandate.

This reply demonstrates that respondents seek to retry the question whether the Iowa statutory charter provisions are entitled to full faith and credit and demonstrates that the real issue is whether the State of Montana, by obstructing the ratable distribution called for by the Iowa statutory charter provisions, has violated the Constitution of the United States.

> The question on this Appeal is whether the policy announced by Montana violates the Federal Constitution. The question whether the Iowa statutory charter provisions are entitled to full faith and credit is not open.

Respondents say Montana need not give full faith and credit to the statutory charter provisions in question.

They do not present their discussion in such plain terms; but the effect of their Points is invariably reduced to the contention that the Iowa statutes are not entitled to full faith and credit.

That question is no longer open. On the former appeal this Court decided (Clark v. Williard, 292 U. S. 112, 78 L. Ed. 1160) that the Iowa statutory charter provisions are entitled to full faith and credit. That holding is the law of the case and is not open to retrial at the behest of respondents.

The only question is whether the Montana court has extended or has withheld the full faith and credit to which this Court has said the Iowa statutes are entitled.

> The Iowa statutory charter provisions fix the relation of each creditor to all the others and call for ratable distribution. The Montana courts have obstructed the operation of those provisions.

The Iowa legislature unquestionably had sole power to determine the relative rights of the creditors, one against the

other, of an insolvent Iowa insurance corporation. That elemental truth follows from the very nature of the corporate entity as defined by repeated holdings of this Court, including Converse v. Hamilton, 224 U. S. 243, 56 L. Ed. 749; Bank of Augusta v. Earle, 13 Pet. 519, 10 L. Ed. 274; Canada Southern R. R. Co. v. Gebhard, 109 U. S. 527, 537.

That relation was within the jurisdiction of the Iowa legislature. The Iowa legislature acted. This Court has said that its acts and the relative rights created thereby must be given full faith and credit.

The controversy is really between the respondents as one creditor and all the other creditors of the corporation, and the issue is whether, as against all the other creditors, Montana may permit respondents to take other than their ratable share in the due course of liquidation.

Respondents lay great stress on matters of title. The designation of the charter liquidator and the title to property are only the machinery through which the relative rights of the creditors are adjusted.

In Montana Petitioner is a charter liquidator with the powers of a receiver. The courts of Montana failed to accord him that status.

For the purpose of assuring ratable distribution, the Iowa statutes, as construed by the Iowa courts and this Court, have terminated the corporate existence and have vested title in the statutory successor, who is a trustee for the benefit of all creditors and who is endowed by those statutes with the powers of a receiver.

The Montana court by its judgment in this very case has held that in Montana executions cannot be levied after the appointment there of a receiver.

In Montana petitioner is a liquidator with the powers and prerogatives of a receiver. Montana cannot question that status, for that is derived from the law of the corporate being.

Montana, notwithstanding the foregoing, has failed to accord to petitioner the protection that it affords to a receiver appointed by the Montana courts.

Attempt is made to bolster the decision now under review by citing Gilna v. Baker, 78 Mont. 357. The directors there acting as trustees were sued, not with respect to corporate liabilities, but in connection with their own accounts as trustees.

Neither the Montana court nor respondents have answered the challenge that the Montana statutes (Section 9303, Revised Codes of Montana, 1921) provide for the appointment of a receiver for a dissolved corporation and that the Montana court has adjudged in this very case (R. 21) that a receiver appointed in Montana will be protected against execution levy.

Such a holding withholds faith and credit to the Iowa statutes or, as pointed out in the petition for certiorari herein, violates the equal protection clause in that it discriminates between a receiver appointed in Montana and one appointed in Iowa. Even a foreign corporation is entitled to the protection of the equal protection clause. Hanover Fire Insurance Co. v. Carr, 272 U. S. 494, 71 L. Ed. 372.

This Court is free to determine whether the policy of Montana as now declared violates the Constitution.

It is said by respondents that the Montana court had the right to declare the policy of Montana as to statutory successors; that this Court remanded the case in order that Montana might so do; and that this Court is now bound by the declaration of policy set forth in the decision now under review. Respondents say that otherwise this Court did a vain thing when it remanded the case.

Such a result does not follow. On the former review this Court decided that the Montana court had misjudged the quality of petitioner's title. Unable to find a satisfactory expression of policy by the Montana court or legislature as to

statutory successors, this Court necessarily remanded the case for such an expression.

Certainly this Court by so doing did not leave the Montana court free to declare and put into effect unconstitutional policies. The interpretation by a state court of a state law is binding upon this Court, but it is not true that this Court in accepting the meaning thus given may not exercise its independent judgment in determining whether that meaning violates the Federal Constitution. Hanover Fire Insurance Co. v. Carr, 272 U. S. 494, 71 L. Ed. 372; St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 59 L. Ed. 265.

The policy of Montana is not material and may not overcome a defense based on Iowa law. Denial of full faith and credit because of policy is nevertheless denial.

Respondents place great reliance on declarations of policy by the Montana court.

The relation between an Iowa corporation and its creditors is not concerned with Montana policy.

This view is supported by the analogy to the relation between a corporation and a stockholder. In Converse v. Hamilton, 224 U. S. 243, 56 L. Ed. 749, this Court held that no state other than the state of corporate domicile may be said to have a policy with respect to the relation of corporation and stockholder.

In Hancock Bank v. Farnam, 176 U. S. 640, 44 L. Ed. 619, this Court held that, notwithstanding Rhode Island policy to the contrary, the courts of that state must enforce against the stockholder of a Kansas corporation a judgment which according to the laws of the latter was enforceable.

In Bradford Electric Light Co. v. Clapper, 286 U. S. 145, this Court held that New Hampshire must adhere to the Vermont Workmen's Compensation Act notwithstanding it was repugnant to New Hampshire policy.

Particularly is policy immaterial to overcome a *defense* based on an applicable foreign law which is entitled to full faith and credit. Petitioner here relies on the Iowa statutes as a defense against the purported execution levy.

The Iowa statutes have been held entitled to full faith and credit. They are urged by way of defense. Denial of full faith and credit is no less a denial because of state policy.

The trial court entered a decree which confirmed the title of petitioner and denied the validity of respondents' purported execution levy (R. 58). Respondents moved to set that order aside and, in the alternative, to substitute certain proposed provisions therein (R. 63). Petitioner defended against that motion by objections which appear at R. 87 and 88. In asserting this defense petitioner is acting on behalf of all creditors of the Surety Company. Petitioner seeks by that defense to resist an attempt to obtain other than ratable distribution by proceedings after dissolution and contrary to the Iowa statutes and decrees.

It follows that petitioner is not attempting in Montana to enforce a foreign cause of action but is presenting a defense based on the Iowa statutes which are entitled to faith and credit.

There is a vital distinction in that a court which merely refuses to affirmatively furnish a remedy based on foreign statutes or decrees leaves the party's substantive right unimpaired. On the other hand, a court which declines to recognize a defense against an asserted right brings about an adjudication of the merits.

The situation would be less acute if the refusal of Montana to give faith and credit were to leave the substantive situation unchanged. The Montana decision does not leave the substantive situation unchanged; it results in a final adjudication.

Reversal of the Montana decision will not subject Montana to the legislative caprice of other states. Montana voluntarily admitted Federal Surety Company. No other state can impose its corporations upon Montana.

Respondents urge that to reverse the Montana court in this case will subject Montana and the control of property there situated to the imposed legislative caprice of the other states. No such result would follow. Iowa cannot impose its corporations on other states. Montana could have refused, and in the future can refuse, to admit any corporation the charter of which provides for ratable distribution in the event of insolvency. Having admitted a corporation the charter of which does provide for ratable distribution, Montana cannot be heard to say that by that admission it has changed the charter provisions.

The operation in Montana of the ratable distribution charter provision results from the voluntary act of the State of Montana evidenced by the admission of the Iowa corporation.

The sovereignty of Iowa and not of Montana is endangered in this litigation. If Montana is permitted to frustrate ratable distribution between creditors of an Iowa corporation, there will have been taken from Iowa the sovereign right to control corporations of its creation, a right which only the creator of a corporation can exercise.

Reference is made to the analogy presented by the marital status which is discussed at Pages 10 and 11 of the petition for certiorari in this case, wherein it is demonstrated that Montana cannot inquire into the validity of a divorce or marriage of Iowa residents. Corporations are within the jurisdiction of the state of creation as effectively as, if not more effectively than, the marital status of persons there residing.

State control of property is subject to constitutional mandate.

Respondents assert that Montana's power to control property within its borders is not affected by the full faith and credit clause.

They cite no authority directly in point. They cite only cases where the courts have held that the Constitution did not delegate any power to the Federal government with respect to property control and therefore that the states are free from any interference from Federal control.

Those cases have no application here. Petitioner does not contend that the control of property has been delegated to the Federal government.

Petitioner relies on the fact that by the Constitution Montana agreed that at the behest of any interested party it would give full faith and credit to the acts and decrees of other states.

There are also those cases which hold that tangible property within a state is not affected by adoption, divorce, or probate laws and proceedings in other states. In those cases the state of situs had in no way assented to the foreign law (as by admission of a corporation), and the state which passed the law had no jurisdiction comparable to the jurisdiction of a state which created a corporation.

The governing principle is not unlike the operation of the due process clause, which did not delegate any power to the Federal government but nevertheless restricted the right of each state to deal with property.

The short answer is that this Court has already held the Iowa charter provisions are entitled to full faith and credit.

Respondents have failed to establish a levy on tangible property with a situs in Montana.

Assuming the accuracy of respondents' contention as to property, respondents cannot in this record show that they have levied on property with a situs in Montana.

The only reference in the record to the nature of the property involved is in the affidavit, R. 68 to 87, and particularly at R. 70, which was submitted in support of respondents' motion to vacate the order and decree entered by the trial court. That affidavit at R. 70, after reciting respondents' judgment and the issuance of the writ of execution, continues:

> " * * thereupon the said Sheriff of Lewis and Clark County, Montana, duly levied upon certain property and bonds of said Federal Surety Company in the hands of A. H. Stafford, Commissioner of Agriculture of the State of Montana, amounting to about $19,000.00 and affiant exhibits hereto, as Exhibit No. 3, a full true and correct copy of said Writ of Execution and, thereafter, on or about the 26th day of May, 1932, the said Sheriff of Lewis and Clark County made a further levy upon the sum of about $8,500.00 of funds in the hands of the Clerk of the District Court, in and for Lewis and Clark County, Montana, belonging to the said Federal Surety Company, its officers or agents, in trust therefor * * "

There is no proof that the property so levied upon was tangible property, and there is no contention that any right by way of pledge had been conferred upon the respondents as to that particular property. For an interest in that property they are dependent entirely upon the levy of execution.

For all that appears in the record, the bonds which they sought to reach were intangibles and may have been bonds of the United States Government or of persons not residing in Montana. The bonds at most were evidences of a debt.

The funds in the hands of the Clerk of the Court which they sought to reach are alleged to have been in trust, but the nature of the trust is not specified, and, for all that appears, that so-called fund was merely a receivable, entirely analogous to a bank deposit or deposit of money with any other person or corporation in Montana.

The distinction between tangibles and intangibles is clearly illustrated by the inheritance tax cases, Baldwin v. Missouri, 281 U. S. 586, 74 L. Ed. 1056; Beidler v. South Carolina Tax Commission, 282 U. S. 1, 75 L. Ed. 131; Farmers Loan & Trust Co v. Minnesota, 280 U. S. 211, 74 L. Ed. 374. In

those cases this Court has determined that evidence of a debt, such as a bond or receivable, has its situs at the residence of the owner, that the transfer thereof is in no way dependent upon the law of any other state, and that an inheritance tax can only be levied by the state of decedent's domicile, and that no inheritance tax can be levied by the state in which the evidence of the debt happened to be located or where the debtor happens to reside.

It follows that respondents cannot demonstrate from the record that the property in question had a situs in Montana. Even though tangible property situated in Montana were free from constitutional mandate, respondents have failed to establish in this record that Montana law as to property governs the items on which they have sought to levy in this case.

The validity and effect of the Iowa liquidation statutes have been upheld by this Court and are not open to question on this appeal.

Respondents contend that the Iowa statutory charter provision relied upon does not apply to them because it was not enacted until 1929 and their cause of action accrued in 1925.

Respondents made this same contention on a former submission of this case in this Court. See Point XIV at Page 35 of respondents' supplemental brief filed in Case No. 449 at the October Term 1933. The decision handed down by this Court in Clark v. Williard, 292 U. S. 112, 78 L. Ed. 1160, ruled on this point adversely to the respondents. The law of the case rule effectively answers this contention, which they seek to repeat.

Nor can it be correctly said that there is any error in the law of the case as settled by this Court.

The Iowa Code of 1897 and subsequent Codes have contained the Section which directed dissolution and appointment of a receiver. It is that Section, by virtue of terminating the corporate existence, which vested title in the statutory successor. Section 8964, Code of Iowa, 1931, being also Section

1731 of the Code of Iowa, 1897 (see Appendix to petition herein).

In 1929 the Iowa legislature merely added the provision that the receiver called for by Section 8964 should henceforth be the Insurance Commissioner. That additional provision merely restricted the discretion of the Iowa courts in determining who shall act as receiver; it did not change the status of the corporation.

The additional provision was enacted in 1929, prior to respondents' purported levy of execution in 1932.

Respondents seek to uphold an execution levy. The validity and effect of that levy must be judged as of the date of the levy. Its validity if it had been levied years earlier is not the question.

The correctness of the law of the case as settled by this Court is further supported by the fact that the right to amend and repeal statutory charter provisions was clearly reserved by the Iowa legislature and by the Iowa Constitution. See Appendix hereto for Section 8376, Code of Iowa, 1931, which also appeared as Section 1619 of the Code of Iowa, 1897. Also see Appendix hereto for Article VIII of the Iowa Constitution.

Charter amendments made pursuant to reserved authority are binding on all parties. Modern Woodmen v. Mixer, 267 U. S. 544, 69 L. Ed. 783; Royal Arcanum v. Green, 237 U. S. 531, 59 L. Ed. 1089. The State of Montana was without power to change the corporate charter as it existed at the time of admission or as thereafter amended.

The Iowa law does not permit execution levies after commencement of liquidation proceedings.

Respondents urge that the Iowa law permits execution levies. They point to Section 8402 of the Code of Iowa 1931 and to the Iowa decision of Watts v. Southern Surety Co., 248 N. W. 347.

The Watts case dealt with an execution levied before the appointment of an ancillary receiver of a foreign corporation and is no criterion from which to judge the law of Iowa which prevails as to levies after appointment of a statutory successor for a dissolved Iowa corporation.

Nor does Section 8402 of the Code of Iowa, 1931, permit execution levies. That Section reads as follows:

> "8402. DISSOLUTION—RECEIVERSHIP. Courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, and to appoint a receiver therefor, who shall be a resident of the state of Iowa. An action therefor may be instituted by the attorney general in the name of the state, reserving, however, to the stockholders and creditors all rights now possessed by them."

That Section merely confers upon the Attorney General of Iowa power to proceed against corporations under circumstances where he might not have had that power at common law. Mindful that the Attorney General might not proceed in all cases, the Section preserves to stockholders and creditors the right to proceed if the Attorney General does not proceed. In other words, the proceeding by the Attorney General was not established as the exclusive method.

That Section merely preserved the rights "now possessed", which are the rights at the effective date of the act. At that date respondents had not levied execution nor, in fact, had their cause of action arisen. Section 8402 certainly did not preserve a lien that was not in existence at the date it was enacted.

> The operation of statutory charter provisions requiring ratable distribution is not dependent upon consent.

Respondents urge that their cause of action is derived from an attachment bond upon which Federal Surety Company appeared as surety and that they never consented to that attachment bond and never contracted with the Surety Com-

pany. The answer to that proposition is found in the fact that the State of Montana admitted the corporation to do business in Montana and authorized it to there execute attachment bonds.

The State of Montana had the power to prescribe whether or not security should be given by the plaintiff in an attachment suit and to prescribe what security, if any, should be given. Montana might have decided that corporations whose charter provisions were similar to those of Federal Surety Company should not be accepted as sureties on attachment bonds. When the Montana legislature enacted provisions which permitted Federal Surety Company to do business in that State and to become surety on such bonds, it did so with full knowledge of its charter provisions. Montana could have permitted the attachment without security. Respondents' rights are limited to those afforded by the law of Montana. By permitting Federal Surety Company to become surety on attachment bonds the State of Montana did not change its corporate charter. The State of Montana was without power to change the charter.

The fact that respondents did not consent to the attachment against their property and to the bond which was given as security cannot operate to make that bond a different obligation of the Surety Company than it would have been had they consented to the bond. This necessarily follows because no power other than the State of Iowa, which created the corporation, could bring about a result contrary to the corporate charter.

As demonstrated in this brief, the corporate charter called for ratable distribution, and to enjoy other than ratable distribution the respondents must show a lien acquired prior to the dissolution of the Surety Company, a showing they cannot make; for otherwise they have utilized the Montana law to bring about a violation of the statutory charter provisions, in direct violation of the full faith and credit clause.

Not only is consent by the respondents unnecessary, but the burden is on the respondents to establish that their execution does not violate the corporate charter.

CONCLUSION.

In this record are all the essentials for a final decision. This Court has decided that petitioner derived his powers from statutory charter provisions which are entitled to full faith and credit. The Montana court has declared its policy to be antagonistic to statutes such as the Iowa statutes and to an officer such as petitioner. There remains the question whether the Federal Constitution prevents Montana from reaching the result presented by this record.

It is respectfully submitted that a reversal must necessarily follow an application of the fundamentals of corporate government as laid down by the former decisions of this Court.

REUEL B. COOK,

EDMOND M. COOK,

M. S. GUNN,

Counsel for Petitioner.

APPENDIX.

Statutes.

Section 8376, Code of Iowa, 1931, being also Section 1619 of the Code of Iowa, 1897.

8376. Legislative control. The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of either title 19, 20, 21, or 22 or whose organization may be adopted or amended thereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used, or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good.

Article VIII, Constitution of the State of Iowa.

CORPORATIONS.

How created. SECTION 1. No corporation shall be created by special laws; but the General Assembly shall provide, by general laws, for the organization of all corporations hereafter to be created, except as hereinafter provided.

Taxation of corporations. SEC. 2. The property of all corporations for pecuniary profit, shall be subject to taxation, the same as that of individuals.

State not to be a stockholder. SEC. 3. The State shall not become a stockholder in any corporation, nor shall it assume or pay the debt or liability of any corporation, unless incurred in time of war for the benefit of the State.

Municipal corporations. SEC. 4. No political or municipal corporation shall become a stockholder in any banking corporation, directly or indirectly.

Banking associations. SEC. 5. No act of the General Assembly, authorizing or creating corporations or associations with banking powers, nor amendments thereto shall take effect, or in any manner be in force, until the same shall have been submitted, separately, to the people, at a general or special election, as provided by law, to be held not less than three months after the passage of the act, and shall have been approved by a majority of all the electors voting for and against it at such election.

State bank. SEC. 6. Subject to the provisions of the foregoing section, the General Assembly may also provide for the establishment of a State Bank with branches.

Specie basis. SEC. 7. If a State Bank be established, it shall be founded on an actual specie basis, and the branches shall be mutually responsible for each others liabilities upon all notes, bills, and other issues intended for circulation as money.

General banking law. SEC. 8. If a general Banking law shall be enacted, it shall provide for the registry and countersigning, by an officer of the State, of all bills, or paper credit designed to circulate as money, and require security to the full amount thereof, to be deposited with the State Treasurer, in United States stocks, or in interest paying stocks of States in good credit and standing, to be rated at ten per cent. below their average value in the City of New York, for the thirty days next preceding their deposit; and in case of a depreciation of any portion of said stocks, to the amount of ten per cent. on the dollar, the bank or banks owning such stock shall be required to make up said deficiency by depositing additional stocks: and said law shall also provide for the recording of the names of all stockholders in such corporations, the amount of stock held by each, the time of any transfer, and to whom.

Stockholders' responsibility. SEC. 9. Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held for all of its liabilities, accruing while he or she remains such stockholder.

Bill-holders preferred. SEC. 10. In case of the insolvency of any banking institution, the bill-holders shall have a preference over its other creditors.

Specie payments—suspension. SEC. 11. The suspension of specie payments by banking institutions shall never be permitted or sanctioned.

Amendment or repeal of laws—exclusive privileges. SEC. 12. Subject to the provisions of this article, the General Assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two thirds of each branch of the General Assembly; and no exclusive privileges, except as in this article provided, shall ever be granted.

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SUPREME COURT OF THE UNITED STATES

October Term, 1934

No. 361

E. W. CLARK,

Commissioner of Insurance of the State of Iowa, as Receiver of Federal Surety Company, Petitioner,

vs.

HARRY O. WILLIARD, W. W. WHEATON, AND C. W. HAY,

As Trustees of Gordon Campbell-Kevin Syndicate, a Common-Law Trust, and Gordon Campbell-Kevin Syndicate, a Common-Law Trust, Respondents.

Brief of Respondents in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Montana

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THE DEMOCRAT, LEWISTOWN, MONT.

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SUPREME COURT OF THE UNITED STATES

October Term, 1934

No. 361

E. W. CLARK, as Receiver,

Petitioner,

vs.

HARRY O. WILLIARD, W. W. WHEATON, and C. W. HAY, as Trustees of Gordon Campbell-Kevin Syndicate, a Common-Law Trust, and GORDON CAMPBELL-KEVIN SYNDICATE, a Common-Law Trust,

Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

Petitioner finds it necessary in order to sustain his petition, to show to this Court that a **Federal question is involved** within the meaning of Subdivision (b) of Sec. 344, Title 28 U. S. C. A. Jud. Code Sec. 237. He is obliged to show that there **is drawn in question the validity of a statute of a state (Montana)** on the ground of its being repugnant to the Constitution of the United States, or to show that a title, right, privilege, or immunity, especially set up and claimed by him, has been denied him by the Montana Court.

I. RESUME OF THE HOLDING OF THIS COURT TO SHOW THAT THERE WAS NO MISINTERPRETATION BY THE MONTANA COURT.

He comes to this Court now faced with the doctrine of res **adjudicata.** His best attack, he thinks, is alleged misinterpretation by the Montana Court, of the clear opinion of the learned Justice of this Court. We shall see that it is petitioner, and no one else, who is guilty of misinterpretation.

To show that there is no Federal question involved which has not already been decided, let us briefly and fairly sketch the decision which remanded the case for further consideration by the Montana Court.

II. THE STATUS OF CLARK WAS GIVEN FULL RECOGNITION. THIS COURT LEFT IT TO THE MONTANA COURT TO SAY WHAT SUCH STATUS ENTITLED HIM TO IN MONTANA.

After passing upon the question as to the jurisdiction of the Court under the facts in the record and holding that the Court had jurisdiction, the Court declared the following things:

(1) That the action did not abate in Montana upon dissolution in Iowa of the defendant corporation. The holding of the Montana Court on this was unequivocally approved and is now res adjudicata. Clark v. Williard, 54 S. Ct. 615, 78 L. Ed. 743.

(2) That inasmuch as the Supreme Court of Montana misunderstood, or rather misinterpreted, th. status of petitioner as fixed by Iowa law and decree, its consequent application of the recognized rule of public policy that such title as that of receiver would not be recognized in derogation of rights acquired by local citizens, there resulted a denial of faith and credit to the Iowa judgment. In view of the settled rules of law as to the application of such a doctrine in favor of local cred-

itors where a receiver was involved, it was certain that if his status were wrongly interpreted there was a denial of that faith and credit which should have been accorded.

(3) This Court then said: "As his title is not the consequence of a decree of a court whereby a corporation still in being has made a compulsory assignment of its assets with a view to liquidation * * * his title is a consequence of a succession established for the corporation by the law of its creation * * *," the Court was obliged to return the case to the Montana Court that it might pass upon the question in the light of this Court's interpretation of that status saying, "whether it would have favored that conclusion if it had correctly interpreted his standing, its opinion does not tell us. The case should go back to the end that the priority of the execution may be determined with understanding of the title displaced and over-ridden."

It was certain that there still remained a question within the jurisdiction of the Montana Court to determine else it would have been idle to use the language last quoted.

(4) The Court conceived that the rule of public policy, applying to receivers, was not so universally applied to liquidators such as it had just determined petitioner to be. There was no holding that the Montana Court must say, in effect (a) We are commanded by the Supreme Court to declare Clark a "Liquidator" or a "statutory successor," instead of a receiver; **and,** (b) as a matter of course, **after we have done so, say that he has a title superior to local attaching creditors.** Far from such a holding. This Court said, as a result of its determination that he was a liquidator and not a receiver: "In thus holding **we do not say that there is an invariable rule** by which the title of a statutory liquidator must prevail over executions and attachments outside of the State of his appointment." After citing the cases,

pro and con, on that subject including a statement from Disconto Gesellshaft v. Umbreit, 208 U. S. 570, 28 Sup. Ct. 337, 52 L. Ed. 625, and after citing Schloss vs. Metropolitan Surety Co., 149 Iowa 382, 128 NW, 384 and other cases to show that some courts declare a public policy which permits local liens to have superiority, while other courts hold that they had no such public policy, this Court said: "Whether there is in Montana a local policy * * * whereby judgments and attachments have priority over the title of a charter liquidator, is a question as to **which the Supreme Court of that state will speak with ultimate authority.**" Why, it may be asked, does the Supreme Court thus defer to Montana? The undoubted answer is: State Court decisions are a finality on matters of local law over which as we shall see, the Iowa Court pronounced the status. Montana had the right to declare what one with such status may take in Montana. Petitioner, in making the contentions he does, is to say the least, disingenous. To contend as he does, indicates that these views of this Court were unwarranted—at least unnecessary.

It may be said, in passing, and with the utmost respect for this Court, that the learned Justice in reviewing the decisions, pro and con, failed to exhaust the list of authorities holding to the view that state public policy does favor local creditors, in cases of liquidators, the same as in cases of receivers. Persons with Clark's status are not always called liquidators. Later on we give a complete list of those decisions the doctrine of several of which have received the approval, from time to time, of this Court.

(5) As an added reason why petitioner and not the Montana Court has misconceived the decision, the learned Justice proceeds to search the Montana decisions to ascertain if such

public policy plainly appeared through a perusal of the statutes or decisions of Montana. If such public policy existed we know the learning of this Court to be such that this Court would then have in effect said:

"Montana's public policy is that the rights of local creditors do over-ride the title of a statutory liquidator, therefore we hold as we have heretofore held, in such a case; and as is indicated above, that controls."

Had the Court been able to determine this matter from clear and unmistakable decisions of the Montana Court or from its legislative enactments, this Court would not have said: "We have no thought to impose our reading of the local statutes and decisions upon the courts of the locality. What we are about to say as to their meaning does no more than explain the grounds for our understanding that the courts of Montana have left the question open. If the law were clear beyond debate, as counsel for the respondents has contended that it is, our duty might be to dispose of the entire controversy now instead of remanding it to the state court for further action there."

Why, if such public policy is wholly immaterial as contended by petitioner, the ascertainment thereof was of such pressing moment as to cause this Court to so state and to then proceed to an analysis of the Montana law, we are at a loss to know. Certainly we are not reflecting upon the intelligence of this Court to the extent of insisting that it would spend so much time on a wholly immaterial matter. Of course this Court said in that connection:

"If such a policy exists, and the foreign liquidator is thus displaced, other questions may remain as to the power of the state which there is no occasion to consider in advance of the event."

Certainly that presupposes "other questions," not this question. Such for instance, as that perceived by the learned Justice of the Montana court when he showed that the doctrine of Blake vs. McClung was not violated by Montana law.

III. CLARK'S STATUS, WITH ALL OF THE ATTRIBUTES OF SUCH STATUS WHICH COULD BE GIVEN BY IOWA LAW AND IOWA JUDGMENTS, DOES NOT PERMIT HIM TO RIDE DOWN MONTANA LAW.

Petitioner has asserted no other question. He thinks that the status of Clark is a status that must be recognized and given exactly the same force in Montana that it is given in Iowa. Montana recognizes the status, but in harmony with what this Court has said as follows: First, in

> Security Trust Co. vs. Dodd, 173 U. S. 624; 43 L. Ed. 835.
>
> "In some states a foreign assignee under a statutory assignment good by the law of the state where made, may be permitted to come into such state and take possession of the property of the assignor there found, and to withdraw it from the jurisdiction of that state in the absence of any objection thereto by the local creditors of the assignor; but in such case the assignee takes the property subject to the equity of attaching creditors, and to the remedies provided by the law of the state where such property is found."

Or again, as was said in

> Fall vs. Eastin, 215 U. S. 1, 30 S. Ct. 3, 54 L. Ed. 65.
>
> "This doctrine is entirely consistent with the provisions of the Constitution of the United States which requires a judgment in any state to be given full faith and credit in the courts of every other state. This provision does not extend the jurisdiction of the courts of one state to property situated in another, but only makes the judgment conclusive on the merits of the claim or subject-matter of the suit."

Or again in

> Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380.

> "Whether appointed as this receiver was, under the statute of New York, or under the rules and practice of chancery as they may be, his official relations in the court are the same. A statutory appointment neither enlarges nor diminishes the limitation under his action. His responsibilities are unaltered. Under either kind of appointment he has at most, only a passive capacity in the most important part of what it may be necessary for him to do, * * * he has no extraterritorial power of official action."

This Court, we think, did not intend to imply that unsound obiter dictum in Relfe vs. Rundle is to be applied, as can be seen from the following analysis:

(1) If Clark is a statutory successor he can have no more power than the corporation had.

(2) The corporation was bound by contract to permit this very thing. Clark, as statutory successor, was also bound.

(3) The sovereignty of Iowa is inalienable. Clark possessed none of it.

> Tanner vs. Little, 240 U. S. 369; 60 L. Ed. 691.
> Harrison vs. State etc. R. Co., 232 U. S. 318; 58 L. Ed. 621.

(4) The sovereign state of Iowa if suing in Montana, would have no more standing nor rights than her humblest citizen.

> 59 C. J. 299.
> 59 C. J. 318-19, Sec. 474.

(5) The Iowa liquidator statute was enacted in 1929. Chap. 233, Laws 43 Ass. Iowa. It was not brought to Montana when the corporation was admitted. The action out of which respondent's judgment arose was instituted in 1928. R. 72-82.

Clark's status as fixed by Iowa law was binding in Iowa. His status was such as to require at the hands of the Montana court that he be permitted to engage in litigation the same as any citizen. If he is statutory successor, his rights in that respect should be as broad as—no broader than—his predeces-

sor's rights. Neither he nor his predecessors can ride down Montana law.

IV. CLARK WAS GIVEN ALL THE MONTANA RIGHTS THAT SUCH STATUS AFFORDS IN MONTANA.

His status in Montana gives him no more rights than one of that status fixed by Montana law would have. Petitioner suggests, for illustration, the case of a marriage valid where made, but forbidden elsewhere because of consanguinity. The right of inheritance becomes involved in a state where such marriage, had it been consummated there, would be void. That state having control over property within its borders, would do as it pleased, and would not recognize that status if it interferred with local policy. But regardless of status, the rights in the property would be measured by the law of the forum.

If there were no public policy to the contrary in the foreign state, her status as wife incidentally fixes her right of descent. What she takes in the foreign state she takes under the grace of the latter's laws. She doesn't take what the law of the domicile says shall go to a widow there. She takes what the foreign state says a widow shall have.

Mr. Chief Justice Gray in Ross vs. Ross, 129 Mass. 243, 37 Am. Rep. 321, fully pointed this out. The rule has been recognized as valid ever since. Cheely v. Clayton, 110 U. S. 701, 28 L. Ed. 298, 4 Sup. Ct. 328. (Relying upon Ross v. Ross, Supra.)

12 C. J. 457, Sec. 42, says:

> "While in some decisions the broad general doctrine is announced that the law of the domicile controls as to the status of the individual, the better rule would seem to be that while the courts of one country will follow the lex domicilii, as to acts done in another in which the party has his legal domicile, they will not regard such law as following the person of the individual and as governing his acts when he is temporarily present in another jurisdiction. In this respect the several states of the Union stand in the

situation of other distinct sovereignties in so far as they are unrestrained by the Federal Constitution. The first branch of this rule results from the principle of comity which requires the courts of one sovereignty to recognize the laws of another as to acts done within its territorial jurisdiction when not contrary to the law or public policy of the forum or injurious to its citizens, while the second branch is a recognition of the undoubted right which each state has to determine the civil status and capacities of its inhabitants. **It is generally accepted also that no state will recognize a status existing under the laws of another state when foreign to its own laws, customs or institutions."**

18 C. J. 844; 18 C. J. 811.

Nichols & Shepard Co. vs. Marshall, 108 Ia. 518; 79 N. W. 282.

In 3 Enc. U. S. Sup. Ct. Dec. (a resume of this Court's decisions) 1026, it is said:

"Each state has the power by general laws to regulate the conveyance and disposition of all property, personal or real, within its limits and jurisdiction. Every state and sovereignty possesses the power regulating the manner and terms under which property, realty and personalty, within its dominion may be transferred by last will or testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it."

The rule is stated in a general authoritative work as follows:

"The dominion of a state over personal property within its borders is complete and its right to regulate its transfer and subject it to process and execution in its own way and by its own laws is unquestioned, though by a legal fiction generally recognized by comity personal property is supposed to adhere to the person of the owner and is usually considered as having no situs other than his domicile."

5 R. C. L. p. 927, and cases cited.

In State v. Crabbe, 151 N. E. (Ohio) 755, it is said:

"It is claimed that, since the receiver, Haavind has statutory powers not bestowed upon a receiver appointed by a court of equity the above authorities do not apply (Schloss v. Met. Surety Co., et al). The statute * * * is not before us, and hence it is impossible to judge what is the

> exact nature of his power. * * * However, the statutory nature of his appointment does not vest in him any property right or lien upon property situated in the State of Ohio superior to the liens of domestic policy holders upon the funds deposited for their benefit and security."

Clark v. Clark, 178 U. S. 186, 44 L. Ed. 1028, 20 S. Ct. 873.

Fall v. Eastin, 215, U. S. 1, 30 S. Ct. 3, 54 L. Ed. 65.

V. NO DISCRIMINATION WAS INDULGED AGAINST CLARK OR IN FAVOR OF MONTANA CITIZENS.

As long as Montana makes no discrimination between citizens of her own and other states, and provides the same remedies for both as that Court has said she does in this respect, the doctrine and public policy of Montana is valid and unimpeachable elsewhere.

It can therefore be plainly seen that this case has been decided. It is res adjudicata. No question remains. No other question is presented.

The only other question petitioner can think of which could be said to remain after such a decision, is stated as follows, by him:

"Either they have withheld faith and credit, or have indulged in a forbidden discrimination between a Montana liquidator and a liquidator appointed in another state." (Pet. p. 3).

This is a desperate torturing of the learned opinion of the Montana Court. The Montana Court in passing, pointed out that the nearest analogy to a liquidator existing under Montana law is that the last Board of Directors become trustees in Montana for that purpose. Iowa says that is his status.

Watts v. Southern Surety Co., 248 N. W. 347.

In invoking the Fourteenth Amendment, petitioner overlooks two important things. By statute, and by condition imposed upon the corporation, of which Clark can claim nothing

more than that he is successor, Montana was acting within constitutional right. So long as Federal Surety Company was not engaged in interstate commerce, there was no restriction in that respect. The business of insurance as conducted by insurance companies, has been held by this court not to constitute interstate commerce. Hooper v. State of California, 155 U. S. 648, 39 L. Ed. 297.

In such cases where the right cannot be claimed under the commerce clause, an insurance company or any company not engaged in interstate commerce, can have no complaint against any law whether discriminatory or not, made a condition to its entering and doing business within the state. Pembina Con. Silver Min. etc. Co. v. Penn, 125 U. S. 181, 31 L. Ed. 650.

Now, if petitioner thinks that we must have the same rule with regard to banks as with regard to insurance and all other corporations, he is foreclosed by all authority.

German Alliance Ins. Co. v. Hale, 219 U. S. 307, 59 L. Ed. 229.

State of Montana ex rel Powell vs. St. Bk. of Moore, 90 Mont. 539; 4 Pac. (2d) 717; 80 A. L. R. 1494;

VI. THERE IS ABUNDANT AUTHORITY INCLUDING DECISIONS OF THIS COURT, FOR SUSTAINING OF ALL GROUNDS OF THE MONTANA DECISION.

Fletcher on Corporations, Secs. 4406, 4410, 4412.

"The right to the equal protection of the laws is not denied when it is apparent that the same law or course of procedure is applicable to any other person in the state under similar circumstances and conditions." Tinsley v. Anderson (Tex. 1898), 171 U. S. 106, 18 S. Ct. 805, 43 L. Ed. 91. See also Williams v. Arkansas (Ark. 1910), 217 U. S. 79, 30 S. Ct. 493, 54 L. Ed. 673, 18 Ann. Cas. 865.

We submit that this Court did not indulge in an idle excursion into the Montana decisions to ascertain if Montana had

such public policy as the Montana Court now declares it to have, to prefer the rights of attachment or execution levies to the title of a foreign liquidator, without first weighing its materiality.

We have only to suggest that the learned author of the opinion (Clark vs. Williard, 78 L. Ed. 743) did not exhaust the authorities so holding, and the following could have been cited in addition to those cited by the learned author of the opinion:

Sec. Trust Co. vs. Dodd, 173 U. S. 624; 43 L. Ed. 835.

Booth vs. Bockis, 140 N. Y. 230; 23 L. R. A. 47.

State vs. Crabbe, 151 N. E. 755.

Carpinter & Baker vs. City Equit. Fire Ins. Co., 328 N. Y. 147; 144 N. E. 484.

Hale vs. Allison, 188 U. S. 56; 23 S. Ct. 244; 47 L. Ed. 380.

Fowler vs. Osgood, 141 Fed. 20; 4 L. R. A. (NS) 824.

Great Western Min. Co. vs. Harris, 128 Fed. 321; (Aff. 198 U. S. 561; 49 L. Ed. 1163).

Zacker vs. Fed. Trust & Safety Valve Co., 106 Fed. 593; 14A C. J. 1394, Sec. 4112.

VII. THE TRUE TEST OF FULL FAITH AND CREDIT IS THAT FAITH AND CREDIT GIVEN LIKE JUDGMENTS AND A LIKE STATUS BY THE COURTS OF THE STATE WHERE SUCH ORIGINATE.

In the scholarly opinion of the Montana Court, it was pointed out that in all events the decision of the Iowa Court as to the effect of such judgments is controlling, and upon the doctrine of the Schloss case decided what Iowa holds the extra-territorial effect of such a judgment to be, and applied that effect.

Under the Federal Statute (Tit. 28, Sec. 687, U. S. C. A.) in supplement to Art. IV, Sec. 1 of the Constitution, Montana was only required to give such faith and credit to the Iowa

judgment as it had "by law or usage in the Courts of the State from whence certified."

In the Schloss case (Schloss, Metropolitan Surety Co., 149 Iowa 382, 128 N. W. 384) it was held that the New York statutory (charter) liquidator could not come into Iowa and displace liens of creditors on local assets, acquired after the liquidator's title had been obtained. Unless Iowa can be said to have two policies, one in favor of her local creditors against such judgments coming from without the state, and another and different one concerning her own identical judgments, the Montana Court is right in thus ascertaining the effect of this very judgment — this very status in Iowa. Iowa cannot have two such diverse policies without constitutional violation. In any final analysis this Court must apply the test, as did the Montana Court, as laid down in Title 28 U. S. C. A. Sec. 687. That test is time honored, and one which this Court will not disregard. When Iowa tells Montana and all other states, as she has done in the Schloss case, that a local creditor's lien is superior to that of a previously acquired but after asserted liquidator's title it settles the matter. 53 C. J. 105, 6; 32 C. J. 1040; Standard Bonded Warehouse Co. v. Cooper, etc., 30 Fed. (2d) 842; 53 C. J. 409, Sec. 692. That and nothing else, is the effect of such a judgment in Iowa, and that is the supreme test.

It is not overwhelming to note that the opinion in the Schloss case arises over a demurrer to an answer. To be justiciable, a legal question must arise some way. How it arose, as long as it was decided, is wholly immaterial.

In that case, the New York statute, as did the Iowa statute here, made the appointment. (See appendix to petition for writ, p. iii).

We respectfully submit that any quarrel that Clark may

have in this case, is a quarrel not with Montana law, but with the law of Iowa under the mandate of the constitution, Article 4, Section 1 and the Federal Statute, Title 28, Sec. 687, U. S. C. A. Iowa herself in the two cases Watt vs. Southern Surety Co., 248 NW, 347 and Schloss v. Metropolitan Surety Co., 149 Ia. 382, as well as other Iowa cases cited in those two, has told us the effect of just such a judgment with just such relationships and the Montana court has applied those effects. Clark must be able to bring to Montana, a different test than he has brought of the effect of those judgments in order to be entitled to complain.

VIII. "CHARTER LIQUIDATOR," ETC., ARE DERIVATIONS BY THE COURTS. THE EXTRA-TERRITORIAL TITLE IS THE SAME AS THAT OF RECEIVERS.

It must be remembered that the phrase "charter liquidator," etc., are interpolations. They are not always found in the statutes. They are terms invented by the courts. Iowa calls Clark simply "receiver." Watts v. Southern Surety Co., 248, N. W. 347. The only way they are arrived at, is through inference. The invention, we submit, is to distinguish two forms of receivership — chancery receivership, and statutory designation of a public officer as receiver. The one comes from the judicial branch of the government,—the other from the legislative branch. Either kind may vest title in the receiver. They are in such cases, **in invitum** proceedings when title is cast. The only distinction between the two is the extraterritorial one, viz., the chancery receiver has not the standing to sue in a foreign jurisdiction. The statutory receiver has such standing. The title of both—**the rights of both—as** against an attaching creditor in the foreign jurisdiction, if such be its public policy, are identical. Watts v. Southern Surety Co., 248 N. W. 347. There can

be no distinction in principle and there is none in law between them.

Security Trust Co. vs. Dodd, 173 U. S. 624; 43 L. Ed. 835.

Disconte Gesellschaft vs. Umbreight, 208 U. S. 570; 52 L. Ed. 625.

Clark vs. Williard et al, 78 L. Ed. 743.

IX. THE RELATION OF RESPONDENTS TO FEDERAL SURETY COMPANY AROSE INVOLUNTARILY.

Respondents were not bound by these alleged charter provisions. The relation of respondents arose involuntarily. A stockholder or policy holder of an insurance company should be bound by virtue of contract by the charter provisions. Not all courts so hold, however.

There is a decided distinction in the case at bar. The relationship was one brought about without the choosing and consent of respondents. They had no dealing with Federal Surety Company. They never voluntarily consented to the attachment bond out of which this liability arose. It was forced upon them. R. 29. The statutes of Montana allowed the plaintiff in the action to attach upon furnishing a bond. They furnished a bond with Federal Surety Company as surety. In Relfe vs. Rundle, the relationship was voluntarily contractual. So also in the Converse and Roche cases.

Respondents were neither made parties to the Attorney General's action, nor appeared in the case. The Federal Surety Company may have represented its stockholders, or even its policy holders, where their relationship had been voluntarily made. But to go so far as to bind these respondents by a judgment in which no one except the named defendant Federal Surety Company was a party is going pretty far. In 34 C. J. 1149 it is said:

The dissolution of a corporation in its own state does not have extra-territorial operation in a foreign state, where the corporation is doing business until the foreign state assumes jurisdiction to enforce the dissolution. Hammond vs. National Life Assn., 58 app. div. 453, 69 N. Y. S. 583 (appeal dismissed, 168 N. Y. 262, 61 N. E. 244) cit. note 89, 14a C. J. 1350.

Applying these two rules: We see that Iowa has not made stockholders nor foreign creditors parties by representation. Moreover, as the Montana Court has pointed out, the status of respondents was fixed before the assertion of Clark's judgment in Montana.

Dissolution even does not affect a contract, where it in effect provides for its continuance despite dissolution. 14 A. C. J. 1155, Sec. 3811.

Its charter powers are affected by local law. In 14 A. C. J. 1240 it is said:

> "The powers of a foreign corporation are limited not only by its charter and the laws of the state which created it, but also by the laws of the state in which it exercises its powers; all its operations are subject to such local laws as are made applicable. A corporation which seeks to establish a business domicile in a state other than that of its creation must take that domicile as individuals are always understood to do, subject to the responsibilities and burdens imposed by the laws which it finds in force there. It becomes amenable to the laws of the latter state and to the process of its courts, upon the same principle, and to the same extent as natural persons or domestic corporations."

> "Every power that a corporation exercises in another state depends for its validity upon the laws of such state, and a corporation can make no valid contract without their sanction, express or implied."

X. CLARK CAN ASSERT NO GREATER CHARTER POWERS THAN THE CORPORATION HAD IN MONTANA.

Now let us see how far these statutes, which are said to be

parts of a foreign corporation charter, go in case of insolvency. In 14 A. C. J. 1394, Sec. 4112, it is said:

> "A statute of the state of a corporation's domicile requiring a general assignment for the benefit of creditors by an insolvent corporation to be made for the benefit of all its creditors does not preclude a citizen of such state, and a fortiori it does not preclude a citizen of another state, from attaching property belonging to such corporation in another state. It is generally held that the property belonging to a foreign corporation within a state may be attached by residents thereof, although a receiver has been appointed in another state to whom, by the decree of the appointing court **or by some statutory provision of that state, title to such property or the right to its possession has been assigned,** but there is authority to the contrary."

There is cited as authority for this last clause but one case —Bockover v. Life Assn., 77 Va. 85.

Only where unrestrained by local law does the rule of Relfe vs. Rundle and Converse vs. Hamilton obtain. Both cases say so.

The Relfe case: "No state need allow the corporations of other states to do business within its jurisdiction, unless it chooses, but if it does **without limitation expressed or implied,** the corporation comes in as it has been created."

In the Converse case, a suit against a stockholder, he was of course bound by the charter, and by a law which prescribed that a receiver might maintain an action "against each stockholder, severally, in this state or any other state or country, where such stockholder, or any property subject to attachment may be found."

It takes a wide stretch of imagination to apply that case here to one whose right arose through an involuntary attachment bond. The attachment bond was executed in Montana, under her laws, and by the authority of them only.

The power to execute the bond might have been derived from the Iowa statute. Rights and liabilities would be determined by the law of Montana.

14 A. C. J. 1236.

The sole point decided in the Relfe case was the right to sue, and hence, derivable therefrom, the standing or status to remove a case to the Federal Court.

Anent the rule that the effect to be given a judgment or a statute of a sister state, is that given there by law or usage, we have to say, that, being the test, there is now **no right** to assert that petitioner is a "statutory liquidator." The Iowa court has held that her statutes allow survival of actions against all dissolved corporations, and characterizes the status of your petitioner who was appointed in like capacity for Southern Surety Co., as follows:

> "In respect to property of the defendant in this state the receiver stepped into the shoes of the defendant and was for this and other purposes representing the corporation in winding up its affairs. State v. Associated Packing Co., 210 Iowa, 754, loc. cit, 768, 227 N. W. 627, 633. In that case we said: 'While it is true the corporation was annulled, nevertheless, for the purpose of liquidating it and winding up its affairs, the receiver still represents the corporation, much in the sense that the directors and officers of a corporation whose corporate period has expired still continue to act for the corporation in winding up the corporation's affairs, and further because of the fact that the receiver has been appointed by a court having jurisdiction of the subject matter, to take over the assets of the corporation and act in the winding up of its affairs'."
>
> Watts vs. Southern Surety Co., 248 N. W. 347.
> State vs. Associated Packing Co., 210 Iowa 754; 227 N. W. 624.

When this case was remanded to the Montana court by this court, the Montana court was re-invested with jurisdiction. It pointed out to this court a rule of reciprocity recognized by this court as validly applying in controversies of this nature. Thus said this court in Hale vs. Allinson, 188 U. S. 56, 47 L. Ed. 380:

> "The question of comity cannot avail in a case where the courts of the state in which the receiver was appointed hold that an action similar to the one brought in the foreign jurisdiction cannot be maintained by him in the courts of the state of his appointment."

That announces the legitimate doctrine recognized in

> Hilton vs. Guyot, 40 L. Ed. 95; 11 C. J. 425; 12 C. J. 434 and 441.
>
> In re John L. Nelson Co., 149 Fed. 590.

In other words, the Schloss case and the Watts case tell us not only the view of Iowa as to the effect of her judgments, but also raise the rule of reciprocity.

We respectfully submit that there is no undecided question nor any question which vests this court with jurisdiction.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

October Term, 1934

No. 361

E. W. CLARK,
Commissioner of Insurance of the State of Iowa, as Receiver of Federal Surety Company, Petitioner,

vs.

HARRY O. WILLIARD, W. W. WHEATON, AND C. W. HAY,
As Trustees of Gordon Campbell-Kevin Syndicate, a Common-Law Trust, and Gordon Campbell-Kevin Syndicate, a Common-Law Trust, Respondents.

Supplemental Brief of Respondents in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Montana

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vs.

HARRY O. WILLIARD, W. W. WHEATON and C. W. HAY, as Trustees of Gordon Campbell-Kevin Syndicate, a Common-Law Trust, and Gordon Campbell-Kevin Syndicate, a Common-Law Trust,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS

I

STATEMENT

This brief is filed as supplemental to the one filed herein in resistance to the petition for certiorari.

By the Judgment of the Supreme Court of the State of Montana entered herein July 24, 1934 (R. 21) (Mieyr v. Federal Surety Co., 34 Pac. (2d) 982), the Supreme Court of Montana recognized the position of Petitioner, Clark, as "the official liquidator—the successor to the corporation—and not a mere equity receiver, and that his title is the consequence of a succession established for the corporation by the law of its

creation" (R. 6). In accordance with the prior decision of the Supreme Court of the United States herein (Clark v. Williard, 292 U. S. 112; 78 L. Ed. 1160), tht Supreme Court of Montana determined and declared the policy of the laws of Montana as follows:

> "When, however, the legislature has spoken upon a particular subject and within the limits of its constitutional powers, its utterance is the public policy of the State." (R. 7.)

The Montana court recognized the fact that it had "under consideration the assets of a dissolved foreign corporation and the claim of a statutory liquidator to the assets" (R. 7). It found that the title of the statutory liquidator appointed by the laws of Iowa was similar to the title of statutory trustees designated by the laws of Montana (R. 8), and declared:

> "The Trustees of a dissolved corporation acting pursuant to section 6011, may be sued in the courts (Gilna v. Barker, 78 Mont. 357, 254 Pac. 174). The property of the dissolved corporation so being administered, is subject to attachment in the same manner and in the same cases where a writ of attachment would run against the property of the corporation itself." (Citing cases.) (R. 8.)

And the Court held that in cases where "the directors of a dissolved corporation for any cause become the statutory trustees, the insolvent corporations are not excluded from the operation of the statutes." (R. 9.)

> "A debtor may pay one creditor in preference to another (Sec. 8601, Rev. Codes 1921). An insolvent corporation, in the absence of statutory prohibition, may prefer one creditor over another, the rule being the same with reference to corporations as it is to individuals (Ames & Frost v. Heslet, 19 Mont. 188, 47 Pac. 805). It was there contended that a different rule should prevail with reference to corporations from the prevailing rule applicable to individuals. In response to the argument the court said: 'The policy of allowing such preferences may be pernicious, even more so that that of allowing an insolvent individual to prefer creditors; but in the one case, as in

the other, it is for the legislature to decide the question of policy, not the court.' " (R. 9.)

The Court further said:

> "Full faith and credit must be given to the decree of the Iowa court and the statutes of that state in this respect, that Clark was entitled to the property, not as an ordinary receiver, but as a quasi-assignee of the dissolved corporation by force of statute entitled of right to defend or sue in its stead in this state. (United States Truck Co. v. Pennsylvania Surety Corporation, 259 Mich. 422, 243 N. W. 311). **But the laws of the state of Iowa do not have extraterritorial force. Rights and remedies of property are governed by the laws of the state in which it is situated.**" (Italics ours.) (R. 11.)

In consequence of the statutory provisions in Montana thus interpreted by the Supreme Court of that state, the court found that the rights of respondents herein as execution creditors of Federal Surety Company were superior to the rights of the petitioner Clark, insofar as they had obtained liens upon property of the defunct corporation situated within the State of Montana prior to the appointment of a receiver on August 3, 1932 (R. 15). The sole question that remains in this case is, whether a state has the power to enact statutes of the character of those existing in Montana and enforce them as against property situated within its borders. In other words, does the full faith and credit clause of the Federal Constitution deprive the State of Montana of power to control the transfer and disposition of property situated within its borders where its laws conflict with the laws of a foreign jurisdiction in which an insolvent corporation happened to be organized?

II

THE ABSOLUTE POWER OF A STATE TO CONTROL THE TRANSFER AND DISTRIBUTION OF PROPERTY SITUATED WITHIN ITS BORDERS IS NOT IN ANY MAN-

NER AFFECTED BY THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION.

> "In the absence of any particular agreement or of particular provisions in the acts of admission varying the ordinary rules, the jurisdiction of a state is coextensive with its boundaries, extending throughout its territorial limits **and operating upon all the persons and things located or situated there,** and, conversely, limited to its own territorial limits and not extending beyond its boundaries." (Italics ours.)
>
> 59 C. J. 21.
>
> "The state regulates its domestic commerce, contracts, **the transmission of estates, real and personal,** and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. They appertain to the State sovereignty as exclusively as powers exclusively delegated appertain to the general government." (Italics ours.)
>
> Thurlow v. The Commonwealth of Mass., 5 How. (US) 504, 588, 12 L. Ed. 256, at 294.

The same general principle was stated by Mr. Justice Field in Pennoyer v. Neff:

> "So the State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claim of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident have no property in the State, there is nothing upon which the tribunals can adjudicate."
>
> Pennoyer v. Neff, 24 L. Ed. p. 565, at 569, 95 U. S. 679 at 723.

In the case of U. S. v. Fox, the Supreme Court of the United

States sustained a New York statute which in effect declared that a devise of real property to the United States was invalid. The opinion of the court was rendered by Mr. Justice Field, and in declaring the absolute power of the state to regulate the acquisition and tenure of property within its borders, said:

> "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. McCormick v. Sullivant, 10 Wheat., 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the State, whether inter vivos or testamentary, are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the State."

United States v. Fox, 94 US 315, 24 L. Ed. 192.

But the power of the State over the acquisition and tenure of personal property is equally as broad as over real property.

Nor is it material that the Court may be of the opinion that the Iowa statutes express a wiser or more equitable policy than the Montana statutes. The question is not one of wisdom but of the power of the state to control property within its own boundaries. The statement of legal principles by Chief Justice Taney in the License cases is pertinent.

> "Upon this question the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power. Are the States absolutely prohibited by the Constitution from making any regulations of foreign commerce? If they are, then such regulations are null and void, whatever may have been the motive of

the State, or whatever the real object of the law; and it requires no law of Congress to control or to annul them."

License Cases, 5 How. 504, at 583, 12 L. Ed. 256 at 292.

III

THE IOWA STATUTE PURPORTING TO VEST TITLE OF A CORPORATION IN CLARK, AS COMMISSIONER OF INSURANCE OF THE STATE OF IOWA, CAN HAVE NO EFFECT UPON PROPERTY SITUATED BEYOND THE BORDERS OF IOWA, EXCEPT AS A MATTER OF INTERSTATE OR INTERNATIONAL COMITY.

"As a general rule, no law has any effect, of its own force, beyond the territorial limits of the sovereignty from which its authority is derived."

25 RCL Sec. 29, p. 781.

"No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived."

Hilton v. Guyot, 159 U. S. 113, 16 S. Ct. 139, 40 L. Ed. 95.

"The legislative authority of every state must spend its force within the territorial limits of the state."

Cooley on Constitutional Limitations (8th Ed.), p. 248.

Thus, a statute and judgment for divorce prohibiting the guilty party from marrying again, is without effect outside of the territorial limits of the prohibiting state.

"It is almost universally conceded that statutes prohibiting the guilty party to a judgment of divorce from marrying again, either for a certain period, or while the other party to the former marriage lives, are without effect outside of the territorial limits of the prohibiting state."

5 RCL p. 1004.

Phillips v. Madrid, 83 Me. 205, 22 Atl. 114, 12 ASR 770, 12 LRA 862 and note.

West Cambridge v. Lexington, 1 Pick. (Mass.) 506, 11 Am. Dec. 231, Note 60 ASR 941.

Owen v. Owen, 178 Wis. 609, 190 NW 363, 32 ALR 1100.

Likewise, the bankruptcy or insolvency laws of one state can have no effect upon property situated in another state.

> "Bankruptcy or insolvency proceedings in one state have no effect of their own force on property situated within another state, and the receiver or assignee may not claim such property as a matter of right."
>
> 5 RCL 1026, Note 12.

In Harrison v. Sterry, 5 Cranch. 289, 3 L. Ed. 104, Chief Justice Marshall stated the rule as follows:

> "As the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States, the remaining two-thirds of the fund are liable to the attaching creditors according to the legal preference obtained by their attachments."

In Cook v. Moffatt, 5 How. 29, 12 L. Ed. 159, Mr. Justice Grier, speaking for the court said:

> "It is true that as between the several states of this union, their respective bankruptcy laws like those of foreign states, can have no effect in any forum beyond their respective limits unless by comity. But it is not a necessary consequence that state courts can treat this such as if the states were wholly foreign to each other, **and inflict her bankrupt laws on contracts and persons not within her limits.**" (Italics ours.)

To the same effect see:

Reynolds v. Adden, 136 US 348, 10 S. Ct. 843, 34 L. Ed. 360.

> "Nor is it a matter of concern whether the trustee appointed in such proceedings be known as assignee, syndic, curator, or receiver; the rights, liabilities, powers and duties of all are about the same."
>
> 5 RCL p. 1026, Note 7.
> Note 23 LRA p. 46.

In Barth v. Bakus, 140 NY 230, 23 LRA 47, the Court of Appeals of the State of New York held that a title to personal

property acquired in invitum under foreign insolvent or bankrupt laws, go according to the law of the jurisdiction where the proceedings were taken, will not be recognized in another jurisdiction where it comes in conflict with the rights of creditors pursuing their remedy there against the property of the debtor, and said:

> "This exception proceeds upon the view that to give effect to such a transfer arising by operation of law and not based upon the voluntary exercise by the owner of the **jus disponendi** would be to give the foreign law an extra-territorial operation which the rule of comity ought not to permit to the prejudice of suitors in another jurisdiction."
>
> See 8549 Fletcher's Enc. Corp. Vo. 17 (Permanent Ed.).

After stating that voluntary assignments will be recognized in a foreign state, the author says:

> "A somewhat different rule applies to transfers or assignments **in invitum** by process of law, or under insolvency or bankruptcy acts. While the authorities on this subject are not altogether harmonious, it is generally held that involuntary assignments for the benefit of creditors, made under a state's insolvency or bankruptcy laws, operate only upon property of the corporation within the state, and not upon property located elsewhere."

In Green v. Van Buskirk, 74 US (7 Wall.) 139, 19 L. Ed. 109, the facts were that on the 3rd day of November, 1857, one Bates who lived in Troy, New York, and owned certain iron safes in Chicago, Illinois, in order to secure an existing indebtness to Van Buskirk and others, executed and delivered in the State of New York to them a chattel mortgage on the safes. Two days after this, Green, the plaintiff in error, also a creditor of Bates, sued out of the proper court of Illinois a writ of attachment, caused it to be levied on these safes, got judgment in the attachment suit and had the safes sold in satisfaction of his debt. Green, Van Buskirk and Bates were all citizens of

New York. Van Buskirk then brought suit against Green for taking and converting the safes. The Supreme Court of the United States, speaking through Mr. Justice Davis, declared the rule that the State of Illinois had complete dominion over all transfers of personal property within its territorial limits, and said:

> "We do not propose to discuss the question how far the transfer of personal property lawful in the owner's domicil will be respected in the courts of the country where the property is located and a different rule of transfer prevails. It is a vexed question, on which learned courts have differed; but after all there is not absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed. And this principle of comity always yields when the laws and policy of the State where the property is located has prescribed a different rule of transfer with that of the State where the owner lives."
>
> 19 L. Ed. at 113.

The same rule is stated in Ruling Case Law as follows:

> "The dominion of a state over personal property within its borders is complete and its right to regulate its transfer and subject it to process and execution in its own way and by its own laws is unquestioned."
>
> 5 RCL 927, and cases cited.

In Direction Der Disconto vs. U. S. Steel Corporation, 267 US 22, 45 S. Ct. 207, 69 L. Ed. 495, this court, speaking through Mr. Justice Holmes, said:

> "But the question who is the owner of the paper depends upon the law of the place where the paper is. It does not depend upon the holders having given value or taking without notice of outstanding claims, **but upon the things done being sufficient by the law of the place to transfer the title."** (Italics ours.)

The provisions of the Iowa statute forbidding the prosecutions of suits in the Montana court or seizure of property situated in Montana need not be given extraterritorial effect under the "full faith and credit" clause of the Constitution.

Atchison etc. R. Co. v. Sowers, 213 US 55, 29 S. Ct. 397, 53 L. Ed. 695.

Tenn. Coal Etc. Co. v. Goerge, 233 US 354, 34 S. Ct. 587, 58 L. Ed. 997, LRA 1916D 685.

Kerney v. Supreme Lodge, 252 US 411, 40 S. Ct. 371, 64 L. Ed. 638, 10 ALR 716.

The decision of the Supreme Court of Montana rendered herein July 24, 1934 (R. 5-15) answers definitely and fully the question submitted as to public policy existing in Montana. No question now remains except as to the power of the State of Montana to thus control the transfer, tenure and distribution of real or personal property situated within its borders. We respectfully submit that the "full faith and credit" clause of the Federal Constitution does not require the State of Montana to surrender to a foreign jurisdiction its control over real and personal property situated within the territorial limits of Montana. The petitioner cites no authority that in any manner sustains such a conclusion. The wisdom of the Montana statutory policy is, of course, not involved (See excerpt from License Cases, quoted supra). The question is merely one of the power of the sovereign state of Montana over property situated within its territorial limits, or conversely stated, the power of the State of Iowa to control the acquisition, tenure or distribution of real and personal property situated beyond its territorial limits and dispose of such property in a manner in conflict with the laws of the state in which the property is situated. The judgment of the Montana court should be affirmed.

IV

THE DECISION OF THE MONTANA COURT IS CORRECT IN ANY VIEW OF THE CASE. FEDERAL SURETY COMPANY DID NOT BRING IOWA'S LIQUIDATOR STATUTE INTO MONTANA AS A PART OF ITS CHARTER.

UNDER NO THEORY WOULD RESPONDENTS BE BOUND BY THE DECREE.

A very questionable doctrine and one which clashes with the general rule, is claimed to exist to the effect that where a statutory provision with regard to the winding up of a corporation is a part of the corporation's charter, it comes into a foreign state with the corporation. We say this is a questionable doctrine in view of the authorities carefully epitomized in the text statement of the leading author on corporations. This court has correctly announced in this same litigation that the matter rests entirely in comity.

Clark vs. Williard, supra.
Sec. 8549, Fletcher Enc. Corp. Permanent Ed. Vol. 17.
See Security Trust Co. v. Dodd, 173 U. S. 624; 43 L. Ed. 835; 19 Sup. Ct. 545.

The doctrine of Relfe v. Rundle has always for its premise, the assumption that where one **voluntarily** contracts with a foreign corporation, he is bound by the laws governing the corporation. Where, as here, there is no voluntary contract, for that reason alone, the respondents are not bound by the law of Iowa.

In the appendix hereto is a copy of the Montana statute with regard to attachments.

A surety company is qualified to write an attachment bond; and an attachment bond is written and filed without consulting with the attachment debtor. While an attachment bond is a contract, it is not a contract into which he has voluntarily entered.

The general insolvency laws of a state do not go with a foreign corporation into a sister state.

Sec. 8320 Fletcher Enc. Corp. Per. Ed. Vol. 17.
See also Sec. 8318 Fletcher, Vol. 17.

On the subject of statutes as a part of the charter, and the assumption that those are brought into the state, Fletcher on Corporations, Sec. 8318, Vol. 17 Per. Ed. says:

> "It is manifest that a contract made by a corporation in a state other than of its creation, is not affected by subsequent legislation in the state by which the corporation was created, as such—subsequent legislation can have no extraterritorial nor retrospective effect."
>
> See also, Prov. Sav. Life Ins. Society of N Y. vs. Bailey, 118 Ky. 36; 80 S. W. 452.

This cause of action arose over liabilities incurred by Federal Surety Company on the 15th day of January, 1925. (R. 79.)

The amended complaint of respondents (R. 72 to 82), was filed January 31st, 1928.

Iowa had no "liquidator" statute (1) when the Federal Surety Company came into Montana; (2) when it executed the bond and incurred the liability which later resulted in the judgment which has occasioned this litigation; and (3) it had no such statute when respondents' instituted the action.

The liquidator statute, or what is claimed to be such, was not adopted in Iowa until April 9th, 1929 (Chap. 223, Laws 43rd Session of the Legislative assembly of Iowa for the year 1929; now Sec. 8613 cl., Code of Iowa, 1931). (Appendix p. iii, Petitioner's Brief in support of petition.)

It will be conceded that the foundation for any exception to the general rule, that insolvency statutes generally are not brought into a state with the corporation charter, is not present nor controlling. The statutes we have seen, which were not in force at the time the corporation came into the state are not, when subsequently enacted, considered as brought in as a part of the charter. This case rests upon a clear differentiation of the doctrine of Relfe v. Rundle, cited by petitioner.

V

THE HIGHEST RESPECT AND THE FULLEST RENDERING OF FAITH AND CREDIT TO A FOREIGN JUDGMENT, IS TO DETERMINE ITS EFFECT AT HOME AND ACCORD THAT EFFECT WHEN IT IS CONSIDERED IN A SISTER STATE.

If the statutes of Iowa are to be given force, they should be given no greater force than that accorded them by the Supreme Court of that State.

In the appendix to petitioner's brief (p. ii) in support of the petition herein, appears cited and quoted Sec. 8402 of the Iowa Code, reading as follows:

> "An action therefor may be instituted by the attorney general in the name of the state, reserving, however, to the stockholders and creditors all rights now possessed by them."

In Watts vs. Southern Surety Co., 248 N. W. 347, the Court, in this very kind of a case, quotes this statute, and gives special emphasis to the last sentence. There the Court said:

> "By the statute authorizing his appointment it was specifically provided that **all rights possessed by creditors at that time were reserved.** The plaintiff in this case was a creditor, and had the rights given him by statute under the attachment and garnishment proceedings. The appointment of the intervener was made subject to these rights. It will not do to say that all his rights were cut off by the receivership proceedings."

Therefore, when Clark was appointed in the instant case, his power was by statute subordinated to the rights of creditors. If so at home, his powers were equally circumscribed abroad.

There, as here, the action by the creditor was first instituted. One cannot read the Watts case without perceiving the fallacy of petitioner's position.

CHARTER LIMITATIONS:

Only those voluntarily contracting with a foreign corporation are bound by its charter.

12 R. C. L. Sec. 15, p. 24.

Only those statutes controlling a corporation at home, and which, under rules of comity, will be given force away from home, will be recognized in a foreign jurisdiction.

12 R. C. L. 25, Sec. 16.

Persons **contracting** with a foreign corporation are presumed to know its charter provisions. Even such persons cannot be held to know, or be bound by legislation to be enacted in the future.

14 A. C. J. 1233, Sec. 3942.

This is as far as the doctrine goes. Even had this been a **voluntary contract,** there was nothing in 1925 in the charter which would have given notice of the claimed limitation. As the matter then stood,

Booth v. Clark, 17 How. 322, 15 L. Ed. 164,

was the ruling doctrine.

Ayres v. Siebel, 82 Iowa 347, 47 N. W. 989;
Parker v. Lamb, 99 Iowa 265, 68 N. W. 686, 34 L. R. A. 704;
State Bank v. McElroy, 106 Iowa 258, 76 N. W. 715;
Nebraska F. Ins. Co. v. Eaton, 107 Iowa 214, 77 N. W. 865, 43 L. R. A. 695, 70 Am. St. Rep. 193.

And this is the universally recognized rule.

Howarth v. Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725;
Barth v. Backus, 140 N. Y. 230, 35 N. E. 425, 23 L. R. A. 47, 37 Am. St. Rep. 545;
Booth v. Clark, 17 How. 322, 15 L. Ed. 164;
Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380;
Great Western Min. etc. Co. vs. Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163.

If such a statute as Sec. 8613 cl. of the 1931 Iowa Code is now a part of the charter of Federal Surety Co., it was not, as we have seen, such at the time the rights of respondents arose. It would follow, then, that at most, it must be conceded to have no greater effect than an amendment of a charter. But that will not aid petitioner.

In 14 C. J. 197, it is said:

> "The mere amendment of a charter or articles of incorporation does not create a new corporation or **otherwise affect the identity of the corporation, or its existing rights of action, property rights, or liabilities**; * *" (Italics ours.)

RESUME

It will be seen from the authorities cited in this brief and in the brief filed in opposition to the granting of the petition for writ of certiorai that:

(1) If the judgment complained of is reversed, it will necessitate the overruling of all substantial American authorities which hold that one state cannot legislate for another.

(2) That all American authority holding that the construction of statutes and the announcement of doctrines which affect judgments emanating from the highest court of the state whence the judgment comes, is the highest test to be applied under the faith and credit clause must be overruled.

(3) That it will be necessary to declare contrary to all established American authority, that a state is not supreme within its borders concerning the devolution of title to property, both real and personal.

(4) It will be necessary to reverse that long line of cases which hold that the insolvency statutes of a sister state have no force and effect beyond the borders of the state.

(5) That if the judgment is reversed, the rules of comity heretofore recognized are abrogated.

(6) If the judgment be reversed it will be necessary to overrule Booth v. Clark, 17 How. 322; 16 L. Ed. 164.

(7) It will necessitate, if the judgment be reversed, to hold that a foreign corporation when it comes into a state, not only brings the general statutes of the state of its incorporation with it, but that it also brings with it, **all future** legislation which may be enacted by the legislature of its home state, and which legislation affects rights which have grown up and ripened **into** liability before the new legislation was enacted.

Respectfully submitted,

LOUIS P. DONOVAN,

H. LEONARD DeKALB,

Counsel for Petitioner.

APPENDIX

Rev. Codes Mont. 1921. Undertaking. Before issuing the writ, the Clerk must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties to be approved by the Clerk, in a sum not less than double the amount claimed by the plaintiff, if such amount be one thousand dollars or under, or, in case the amount so claimed by plaintiff shall exceed one thousand dollars, then in a sum equal to such amount, but in no case shall an undertaking be required exceeding in amount the sum of ten thousand dollars. The condition of such undertaking shall be to the effect that if the defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages he may sustain by reason of the issuing out of the

attachment, not exceeding the sum specified in the undertaking. Within five days after service of the summons in the action, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two days nor more than five days, must justify before a judge of the district court, or before the clerk thereof, and upon failure to justify, or if others in their place fail to justify, at the time and place appointed, the clerk or judge shall issue an order vacating the writ of attachment.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 361

E. W. CLARK, Commissioner of Insurance of the State of Iowa, as Receiver of Federal Surety Company,

Petitioner,

vs.

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Respondents.

BRIEF FOR GEORGE S. VAN SCHAICK, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, ON THE PETITION FOR A WRIT OF CERTIORARI, SUBMITTED AS A FRIEND OF THE COURT.

LOUIS H. PINK,
of New York City,
Attorney for GEORGE S. VAN SCHAICK,
as Superintendent of Insurance of the
State of New York.

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Statement.

The Superintendent of Insurance of the State of New York appears on this application as a friend of the Court. The New York Insurance Department is probably more vitally concerned with the outcome of this litigation than the parties themselves. New York is the domicile of more large insurance companies doing inter-state business than any other state in the Union. During the crisis the Department was compelled to take over for conservation, rehabilitation or liquidation more companies doing an inter-state business than any other Department in the country. The New York Superintendent, like the Superintendent in

Iowa, is the statutory liquidator and under our laws, upon dissolution, the life of the company becomes extinct and title to all assets is vested in the Superintendent of Insurance for the benefit of creditors.

It is because of the very serious and substantial difficulties in the administration of these companies that the Superintendent of Insurance pleads with this Court to take jurisdiction and outline in broad and unmistakable terms essential policies applicable to the administration of the assets of large insurers having creditors scattered throughout the Union.

We shall not burden this Court with a repetition of the authorities which have been cited and discussed in the briefs of the parties but shall confine this discussion to the effect of the policy expressed by the Montana courts on the administration of the estates of large insurers.

Uniform law and procedure in the liquidation of interstate insurers is essential if injustice and inequalities are to be avoided and trust properties are to be distributed fairly and equitably to those entitled thereto.

It is our experience in the administration of large insurance companies which have been dissolved by our statute that while both creditors and assets are widely distributed throughout the various states practically no net assets are received by the statutory liquidator from other states. The funds are usually consumed in local administration and too often are dissipated by needless lawsuits and by a few selfish local creditors who have been able to attach the property of the liquidator and convert it, through a local decision, to the satisfaction of their own claims regardless of the rights of creditors in general. We do not refer here to legitimate preferences to the assets in the state created by law and arising out of public policy and public welfare, such as preference to compensation claimants which is granted in four of the states, or to the local distribution of trust funds for the benefit of claimants who

appear in the proceedings in that state, but rather to the attachment of the general assets of the liquidator located within the state by individual creditors and the attempt to satisfy their claims in full regardless of the ratable distribution to other creditors of the same class.

In Montana a writ of attachment was secured by a local creditor against the property of one of our companies although the company had been dissolved and title to the assets had been vested in the Superintendent as liquidator before the action was commenced. The issues presented are now in litigation and the decision of the court in the present case will have a great bearing on the determination of this litigation.

In Michigan the receiver appointed at the behest of an attaching creditor was given preference over the receiver appointed at the request of the local Superintendent of Insurance for all creditors. This dispute is in process of adjustment but the litigation is still pending.

Even in the State of Pennsylvania, which has generally pursued an enlightened policy, this issue is in doubt and there are some decisions to the effect that local creditors of a foreign insurance company must be paid in full before any assets can be removed from the state.

As we go to press we learn that an Alabama court has decided that the surplus from a local deposit of a New York company in liquidation, after the payment of the creditors and the Alabama official bonds for which the deposit was made, will not be returned to the New York liquidator for general distribution but is payable to Alabama claimants.

In Ohio local creditors have attached funds of a New York company and are attempting to hold them for the full satisfaction of their own claims regardless of the rights of other creditors.

On the other hand, in Oklahoma a local creditor obtained judgment by default against the Federal Surety Company after the dissolution of that corporation in the state of its domicile and upon the question of the validity and en-

forcibility of the judgment the Federal District Court in Oklahoma held:

> "'From the time of that entry the corporation has been dead, all its agencies ended, its employees, including attorneys, discharged; and it put, without exception or notice of appeal, beyond all future corporate activity.
>
> "'The effect was to "put an end to its existence for all purposes whatsoever, and to destroy every one of its faculties, so that thereafter it can neither make nor take contracts, nor sue nor be sued, and so that all debts to or from it became extinguished, and all actions by and against it abated."' * * *
>
> "It is 'only the corporations whose charters expire by limitation or the voluntary act of the stockholders which continue for the purpose of winding up their affairs, Section 1629 Code; State *vs.* Fogerty, 105 Iowa 36, 74 N. W. 754. * * * To a corporation dissolution is as final as death to a person. It thereafter can have no interest in the property once by it controlled. * * * That is the subject of administration'." (State of Iowa *v.* Fidelity Loan & Trust Co., 113 Iowa 439, 85 N. W. 638.)
>
> *Clinton* v. *Coppedge*, 2 Fed. S. 935 (decided in March, 1933).

With the principles laid down by the Oklahoma court we are in hearty accord. The contrary decisions and policies adopted in the various states—some broad and public spirited; some selfish and short-sighted—make just and equitable liquidation of inter-state insurers almost impossible. It is for the purpose of attempting to correct this situation that we appear here, although we are not parties to the action.

The status of a dissolved insurance company must be determined by the state of its creation. If, under the laws of the state creating and dissolving a corporation the corporation ceases to exist, the action of such state is as decisive in the foreign state as in the state of its creation,

for as Chief Justice Taney said in the *Bank of Augusta* v. *Earle*, 13 Peters, 519, 588:

> "A corporation can have no legal existence out of the boundary of the sovereignty by which it is created * * * it must dwell in the place of its creation and cannot migrate to another community."

The courts or legislatures may limit the privileges and rights of a foreign company admitted to its state but cannot enlarge the charter powers. Unless the state creating a corporation prolongs its existence for specified purposes and a designated time, subsequent to dissolution, foreign states have no power to do so.

The Montana policy will interfere with, and is directly opposed to, the very purpose of liquidation proceedings. These proceedings are instituted with a view of administering the affairs of a dissolved insurance company for the benefit of, and to distribute its assets among, all creditors similarly situated, wherever resident, upon the principle that equality is equity. In such proceedings every general creditor, wherever residing, is entitled to share ratably in the distribution of the general assets of a dissolved insurance company; and after the dissolution of a company, no creditor should be permitted by smart legal proceedings to acquire a priority or preference over other creditors similarly situated. The effect of the Montana policy as now declared very obviously accords Montana creditors preferences and advantages which are not accorded to other creditors.

If the broad, general principles laid down by this Court in *Relfe* v. *Rundle*, 103 U. S. 222 and *Converse* v. *Hamilton*, 224 U. S. 243, were generally accepted and followed by the courts of the various states, the petition for review would not be necessary. Not only in these decisions, but in the General Order in Bankruptcy No. 51, this Court has taken the position that the administration of the assets by the primary receiver shall not be carelessly and selfishly interfered with by local creditors. The liquidator of a large

insurance company, like the primary receiver in bankruptcy, must, in order to fairly and efficiently administer the estate and distribute the assets equitably, have general control of the assets of the dissolved company throughout the United States and local receivers should cooperate with the receiver in the domiciliary state. The vesting of title in the liquidator for the benefit of all creditors must be recognized by local courts if serious injustice and inequality are to be prevented.

In the interests of orderly liquidation we ask this Court to take jurisdiction of this case and unmistakably elucidate for the guidance of the local courts a broad, general and equitable policy for the administration of the estates of inter-state insurers by statutory liquidators vested with title to assets.

LOUIS H. PINK,
Attorney for GEORGE S. VAN SCHAICK,
AS SUPERINTENDENT OF INSURANCE OF
THE STATE OF NEW YORK.

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BRIEF FOR R. EMMET O'MALLEY, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF MISSOURI, WHO AS A FRIEND OF THE COURT SUBMITS THIS BRIEF.

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No. 361.

STATEMENT.

The Superintendent of the Insurance Department of the State of Missouri appears in this matter as a friend of the Court and does so on behalf of the sovereign State of Missouri. The State of Missouri, particularly in the discharge of its functions in the supervision of its insurance corporations, will be vitally and directly affected by

the decision in this cause. The State of Missouri has delegated to its Insurance Department, and particularly to the Superintendent of that Department, the responsibility of supervising the conduct of business by Missouri insurance corporations and the rehabilitation and winding up of the affairs of any such company that may become impaired or placed in liquidation. The status of the Department and its Superintendent with respect to liquidation of Missouri insurance corporations has previously been before this Court. See *Relf* v. *Rundle*, 103 U. S. 222, 26 L. Ed. 337.

The Missouri Department is now engaged in the rehabilitation of the affairs of several Missouri insurance corporations. The following instances will indicate the direct interest which the State of Missouri and its Superintendent of Insurance have in the subject matter of this controversy:

> In August, 1933, the Superintendent of Insurance for the State of Missouri became the liquidating officer of Missouri State Life Insurance Company, a Missouri corporation. Thereafter the Courts in Oklahoma, Georgia, Indiana and Florida appointed a receiver for said corporation and its assets in their respective jurisdictions. From the ruling of the trial court in the States of Oklahoma and Indiana, appeals have been taken and are now pending before the Supreme Courts of said States.
>
> In the States of Georgia and Florida the trial courts are now considering the status of the receivers there appointed.
>
> In May, 1934, the Superintendent of Insurance of the State of Missouri, was vested with title to all the assets of the Continental Life Insurance Company, a Missouri corporation, for the purpose of rehabilitating the affairs of that Company. Subsequent thereto the courts in the States of Oklahoma and California

appointed receivers for said corporation. The question of the status of such receivers is now pending before the courts making such appointments.

Both of the foregoing Missouri corporations transacted business in more than thirty-two States of the United States, and had assets situate in most of said States.

In spite of the decisions which have been handed down and which touch upon the effect to be given to statutory charter provisions, there still remains either a great deal of uncertainty or a wilful determination to avoid the principles enunciated. The liquidation of insurance companies presents a most difficult problem because they cannot be brought within the protection of the Bankruptcy Act. To provide a uniform liquidation of the affairs of such companies and an equitable distribution of its assets among those entitled thereto, the statutory law of the State creating such corporation, providing the only method by which such companies can be liquidated or rehabilitated must be given effect. Many of the companies transacted business on a vast interstate scale. In the liquidation and rehabilitation of their affairs there is encountered an intense desire upon the part of certain individual creditors in foreign States to derive some special benefit out of the local assets which will put them in a better position than creditors generally. The true principles involved do not receive the same impartial consideration as principles governing other and more usual local situations. As a result, under existing conditions the statutory liquidation or rehabilitation officer of an insurance company is constantly thwarted in the administration of his trust by being confronted with the alternative of conceding unreasonable demands, or of encountering serious waste of assets by way of compromise or expensive litigation.

In the interest of the discharge of the sovereign responsibilities of the State of Missouri and for the purpose of aiding in defining the issues this brief is presented.

Contentions of the Parties.

The parties are not in accord on the nature of the question to be decided. Petitioner demonstrates that the Iowa statutes and the former decisions of the Court result as follows:

> 1. He is the statutory successor of the dissolved Iowa insurance corporation.
>
> 2. The Iowa statutory charter provisions require ratable distribution of assets of a dissolved Iowa insurance company among all its creditors.
>
> 3. The full faith and credit clause requires recognition of those established truths.

Petitioner in effect says that there is only one issue remaining, viz.:

> What is required of a State in order that it evidence the recognition to which the full faith and credit clause and former mandate of this Court entitle the Iowa statutory charter provisions, including Petitioner's status?

Stated in another way, petitioner stands before this Court and in effect says: My status is defined as the person designated by the laws of Iowa, to take the property of a dissolved insurance company of that State, and ratably distribute same among all creditors and other interested persons. This Court has said that my status and incidentally the status of all the creditors, must be

recognized in Montana. Montana has not complied with that requirement.

Respondents, on the other hand, state that petitioner's status, though required to be recognized under the Constitution in Montana, is not binding on Montana courts, and gives to petitioner no greater rights with respect to property situate in Montana than his predecessor had. Their brief in this respect fails to recognize that petitioner's status has been fixed by this Court, and that this Court has said that the Federal Constitution requires recognition of the statutory charter provisions creating petitioner's status. The resistance thus directed is to questions already decided by this Court.

For example, respondents' brief deals at length with decisions such as *Security Trust Co.* v. *Dodd*, 173 U. S. 624; *Fall* v. *Eastin*, 215 U. S. 1; *Hale* v. *Allison*, 188 U. S. 56. That brief draws from those decisions the conclusion that Montana is free to deal with the statutory charter provisions as Montana sees fit. That argument would only apply if the statutory charter provisions creating petitioner's status were not entitled to full faith and credit. The mandate of the Constitution and the mandate of this Court compel recognition thereof.

Issue.

This litigation has narrowed to a point where this Court has the opportunity to set at rest a great deal of misapprehension and enunciate a policy vital to an orderly liquidation of dissolved insurance companies. The issue for decision is:

> **Is the constitutional requirement of full faith and credit met by an allegation of compliance (in a judicial opinion), or is compliance to be judged by the result arrived at?**

POINTS FOR ARGUMENT.

I. Authorities are inapplicable insofar as they discuss and decide the question whether a foreign statute or decree is entitled to full faith and credit. In this case it has been decided that the statutory charter provisions are entitled to full faith and credit.

II. The only task remaining is to define compliance with the full faith and credit requirement. What must be done to grant full faith and credit?

III. The conflict of sovereign powers is not involved.

IV. A separate consideration of points in the respondents' opposition brief.

I.

Authorities are inapplicable insofar as they discuss and decide the question whether a foreign statute or decree is entitled to full faith and credit. In this case it has been decided that the statutory charter provisions are entitled to full faith and credit.

The brief of respondents, filed in opposition to the petition for writ of certiorari in this case, seeks to retry the question whether the Iowa statutory charter provisions creating petitioner's status are entitled to full faith and credit. The decisions relied on, such as the *Security Trust Case, Fall* v. *Eastin,* and *Hale* v. *Allison* (all cited above), only hold that the particular act or decree there considered was not entitled to recognition or full faith and credit. They are inapplicable here because this Court has already held that statutory charter provisions and the status resulting therefrom are entitled to full faith and credit. This Court as a matter of authority so decided in *Relf* v. *Rundle,* and in the Converse cases.

In this particular litigation that determination has become the law of the case.

This case involves statutory charter provisions and a status which are entitled to full faith and credit. So much has been settled; and to bring in cases which deal with a judgment, with a statute, or with a status which has been held otherwise, merely complicates the situation.

II.

The only task remaining is to define compliance with the full faith and credit requirement. What must be done to grant full faith and credit?

In Montana petitioner or any other statutory successor must be recognized and treated as such. He is undeniably there. The full faith and credit clause has figuratively taken him there. What may the foreign State do with him and the status that he is endeavoring to carry out? A decision such as the last Montana decision now under consideration in effect says:

> "We recognize you as a statutory successor. We acknowledge your presence in Montana. Having said as much, we have complied with the full faith and credit clause. Therefore, we are freed from further constitutional restriction and will treat you as we wish."

If the constitutional requirements are satisfied by such sophistry, then the Constitution will surely collapse of its own weight.

There remains the unalterable fact that a statutory successor such as petitioner, when he goes into a foreign State, is in that State a statutory successor with the powers and prerogatives of a trustee of an express trust.

This results unerringly from the full faith and credit clause. If that State fails to accord him that status it has denied full faith and credit to the statutory charter provisions of a sister State governing the liquidation of one of its dissolved corporations; and its denial is in no way mitigated by its bland statement in judicial opinion that it has accorded petitioner's status with full faith and credit, when the obvious effect of such opinion is to the contrary.

III.

The conflict of sovereign powers is not involved.

The alleged conflict between sovereign powers has been removed from this case by the decisions of this Court, which have placed statutory succession statutes within the category entitled to full faith and credit.

Though the question of sovereignty were at stake, no violence would be done on the theory adhered to by the respondents, which is, that the Montana law must be looked to for the purpose of determining the rights of a receiver or statutory successor in Montana.

We concede that if receivers were unknown to the Montana law, and if Montana would not protect its own receivers, that under those circumstances Montana would not be required to protect the statutory successor of a foreign corporation against execution levies. Petitioner only complains that Montana will protect its own receivers and refuses to protect him against execution levies.

Such a position concentrates too strongly on the individual. The problem arises because the statutory charter provision calls for ratable distribution. The petitioner's title and his status are incidents only. When a statutory charter provision calls for ratable distribution of the

assets of a dissolved insurance corporation, that statute is denied full faith and credit by any foreign State which so acts as to prevent ratable distribution. Up to the point of averting ratable distribution all other States may exercise all the latitude they would exercise in any other case.

The judgment of the Supreme Court of Montana in this case determines that it will protect the title to property of a Montana liquidator or receiver against the levy of execution after the time of his appointment, but at the same time denies such protection to petitioner. Full faith and credit is not given to the status of petitioner by the determination of the Supreme Court of Montana that petitioner can only make ratable distribution after the date of Critchton's appointment as ancillary receiver in Montana. Full faith and credit must be given to the statutory charter provisions requiring ratable distribution to be made of the property of a dissolved insurance corporation, the same as full faith and credit must be given to the title of petitioner to such property.

Any conclusion other than the foregoing will set a precedent which will inevitably permit all the States to comply with the constitutional requirements by rendering no more than "lip service."

IV.

A separate consideration of points in the respondents' opposition brief.

Up to this point this brief has dealt with the brief of respondents filed in opposition to the petition for certiorari only in its broader aspects. The purpose at this point is to deal more specifically with some of the contentions therein set forth.

(A.)

Respondents first contend that the first decision in this case by this Court permitted the courts of Montana after remand to decide this case as they see fit. Respondents say that otherwise this Court engaged in a useless gesture when it remanded the case. This contention is the equivalent of saying that the State of Montana is not bound by the Constitution. When it handed down the first decision in this case, this Court had before it only the question whether petitioner derived title to property in Montana as statutory successor and charter liquidator, or as a receiver through judicial proceedings. This Court could not at that time determine the public policy of Montana as to statutory successors, and necessarily remanded the case in order that Montana might announce its policy. True enough, there was the possibility that Montana might announce an unconstitutional policy. This Court justifiably refrained from assuming that Montana would do so. But certainly this Court by remanding the case did not leave Montana free to announce unconstitutional policies.

(B.)

At pages 8 and 9 of their brief the respondents endeavor to demonstrate that petitioner in Montana was protected against execution levies as fully as a Montana liquidator would have been. In the first place, the text of the brief on pages 8 and 9 utterly fails to substantiate that contention. In any event, however, the text fails to answer the proposition that Section 9303 of the Civil Code of Montana provides for receivers of dissolved corporations and that the very judgment appealed from in this case protects a receiver so appointed in Montana. To

say, under those circumstances, that a foreign liquidating officer was protected as fully as a Montana liquidator is to deny the obvious.

(C.)

At pages 10 and 11 respondents endeavor to demonstrate that there was no discrimination, first, because levies of execution were open to all persons, and second, because there is no such thing known to Montana law as a liquidator, except the last Board of Directors. This latter contention again overlooks Section 9303 of the Civil Code of Montana, which expressly provides for a receiver in certain cases. We contend only for the proposition that a foreign liquidating officer is endowed with the powers and prerogatives of a receiver liquidating a dissolved corporation in Montana. The Montana law clearly provides for a receiver to liquidate the affairs of a dissolved corporation. The Montana court in this very case has upheld the appointment of a receiver and has protected that appointment against execution levies.

(D.)

On pages 12 and 14 of their brief respondents endeavor to demonstrate that the Iowa law permits levies of execution against Iowa liquidators and that therefore Montana may permit such levies. In the first place, we find no evidence in the record that the Iowa law does permit such levies. Respondents apparently go outside the record and rely upon the cases of *Schloss* v. *Metropolitan Surety Co.*, 149 Iowa 382, and *Watts* v. *Southern Surety Co.*, 248 N. W. 347. Those cases do not deal with the policy of Iowa as to receivers appointed in Iowa. The Schloss case dealt with a levy of attachment against

property claimed by a non-resident receiver whose status was apparently never clearly placed before the Court. The Watts case dealt with an ancillary receiver of a foreign corporation appointed after a levy of attachment. The levy of attachment which was made before the appointment of the ancillary receiver was upheld. Neither of these cases, in our opinion, demonstrates that the courts of Iowa would permit levy of execution against a receiver appointed to liquidate the affairs of a dissolved corporation in Iowa. Notwithstanding the decisions in the Schloss and Watts cases, *supra*, the public policy of Iowa has been declared by statute, and requires a ratable distribution of the assets of a dissolved insurance corporation among its creditors. It is no defense to say that because Iowa courts might act unconstitutionally, Montana courts may do so.

(E.)

On page 16 of their brief, respondents assert that petitioner has no greater charter powers than the corporation had; that the charter permitted levies of execution against the corporation; and that therefore the charter permits levies against the statutory successor. The fallacy lies in the assumption that the statutory liquidating officer must submit to the same treatment as the corporation that he has succeeded, when being operated as a going concern. The purpose of the liquidating act of Iowa is to procure ratable distribution. The property in the hands of the statutory successor is in quite a different status than the same property in the hands of the corporation.

Conclusion.

The situation presented by this litigation is acute. State officials endeavoring to work out ratable distribution to creditors of their respective insolvent insurance companies have been faced with tremendous difficulties, not alone because of unwarranted preferences acquired by creditors in other States, but because of the great expense and loss resulting from the very uncertainty which has brought about the situation now before the Court. Even though the domiciliary liquidator ultimately prevails in the courts of a state, in the end there is a drastic loss to creditors generally because the liquidator has been forced into litigation and into compromises which result in a diversion of assets. Liquidation expense out of all proportion to accepted standards is necessarily incurred.

The very fact that doubt exists as to the rights of the domiciliary liquidator and as to the effect of the statutory charter provisions in foreign jurisdictions is the cause of great loss and waste. Whatever can be done to clarify the situation beyond equivocation will enure vastly to the benefit of the great mass of citizens who are willing to stand by and to take ratable shares in the distribution of assets.

The foregoing derives its greatest strength from the proposition that this Court has already held that the statutory charter provisions are entitled to full faith and credit. To define the requirements of full faith and credit as here contended for will be merely an extension

of principles already well settled, will do violence to nothing, and will accomplish a sound and necessary result.

Respectfully submitted,

ALLEN MAY,
Special Counsel for the Superintendent of Insurance of the State of Missouri.

Of Counsel,
JAMES P. AYLWARD,
ALBERT A. RIDGE.

APPENDIX.

Section 9303, Revised Codes of Montana, 1921:

9303. Appointment of receivers upon dissolution of corporations. Upon the dissolution of any corporation, the district court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1934.

No. 361

E. W. CLARK,
COMMISSIONER OF INSURANCE OF THE STATE OF IOWA, AS RECEIVER OF FEDERAL SURETY COMPANY,
Petitioner,

vs.

HARRY O. WILLIARD, W. W. WHEATON AND C. W. HAY,
AS TRUSTEES OF GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON-LAW TRUST, AND GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON-LAW TRUST,
Respondents.

AMICUS CURIAE BRIEF AND ARGUMENT OF ERNEST PALMER, DIRECTOR OF INSURANCE OF THE STATE OF ILLINOIS.

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Respondents.

AMICUS CURIAE BRIEF AND ARGUMENT OF ERNEST PALMER, DIRECTOR OF INSURANCE OF THE STATE OF ILLINOIS.

STATEMENT.

MAY IT PLEASE THE COURT:

The Director of Insurance of the State of Illinois submits this brief on behalf of the People of the State of Illinois and the Department of Insurance thereof.

In Illinois, liquidation of insurance companies is effected through a receiver, appointed by the Director of Insurance, after a court hearing on the existence of cause for the appointment, under the provisions of an Act entitled "An Act in relation to delinquent insurance companies, associations and societies," approved June 26, 1925, as amended and supplemented, to be found in Cahill's Illinois Revised Statutes, 1933, Chap. 73, Par. 105 (1) to (13), pages 1603-1606.

Section 4 of the Act provides that the receiver shall be vested by operation of law with title to all of the property, contracts and rights of action of the company.

Several insurance companies of Illinois are now in course of liquidation under the provisions of the above mentioned Act. One of them, the National Life Insurance Company of the United States of America, had over two hundred million dollars of life insurance in force and did business in more than twenty States; another, the Peoria Life Insurance Company, had more than one hundred million dollars of life insurance in force and did business in several States.

In the course of these liquidations, questions have arisen concerning the titles of the receivers, and the rights of creditors of the companies in foreign States, upon which the decision in this case will have a direct bearing.

The purpose of this brief is to state the principal questions involved in this case as they appear to the Director of Insurance of the State of Illinois and to comment thereon.

The statutory charter provisions, upon which the petitioner in this case relies, fix the rights of all corporate creditors one against the others and require that each

creditor shall receive equable distribution without preference acquired by any act after dissolution.

The principal question is: May another State disregard the statutory charter provisions and adjust the rights of creditors one against the others, in a manner contrary thereto?

The Montana court in the decision complained of purports to deal with the power of Montana to control titles to property located within its confines. That, it is submitted, is only an incident to the question for decision. The Montana court purports to recognize the title of the charter liquidator, but recognition of the title is not enough. It is necessary to look to the purpose for which the statutory charter provisions vested title in the liquidator. That purpose is to procure equable distribution. That purpose is to be accomplished through the medium of a statutory trust, created under the charter, of which the charter liquidator is trustee. The important question here is not who shall be the trustee, but whether one creditor may obtain a preference at the expense of another, notwithstanding the charter provisions. Providing for equable distribution was within the jurisdiction of the Iowa legislature, and the statute accomplishing that purpose, and the Iowa decrees which were entered against the Federal Surety Company in accordance with the Iowa statute, are denied full faith and credit, when another State takes action that results in creditors receiving other than equable distribution.

A summary of the argument contained in this brief follows:

I.

The full faith and credit clause requires that a statute of Iowa, and decrees of an Iowa court entered pursuant thereto, directing equable distribution of the assets of an Iowa corporation among its creditors, shall be given effect in Montana.

II.

Montana local policy cannot control the Iowa statute or decrees providing for equable distribution. Any such policy must yield to the full faith and credit clause when asserted as a defense against a creditor's attempt to obtain a preference contrary to the Iowa statute and decrees.

III.

Iowa alone possesses jurisdiction to determine the rules by which intangible property of one of its dissolved corporations shall be held, transferred and distributed among that corporation's creditors.

IV.

Comments upon certain contentions relied upon by respondents or the Montana Supreme Court.

(a) Respondents' contention that full faith and credit need not be given to the legislation or judgments of other states regarding title to real estate not located therein.

(b) The Montana court's decision that Montana has control over rights of property located therein and remedies in regard thereto.

(c) The contention that Chapter 233 of the Iowa statutes restricting the Court's choice in selection of a receiver was passed subsequently to the execution of the attachment bond and therefore should not be regarded.

(d) The contention that respondents did not deal voluntarily with the Federal Surety Company.

(e) The contention that because the property in the hands of the Surety Company was subject to execution levy, it is likewise so subject in the Receiver's hands.

ARGUMENT.

I.

The full faith and credit clause requires that a statute of Iowa, and decrees of an Iowa court entered pursuant thereto, directing equable distribution of the assets of an Iowa corporation among its creditors, shall be given effect in Montana.

The real question here involved is not one regarding the power of Montana to determine the law under which title to property located within its jurisdiction shall pass or liens thereon be created, but is whether the full faith and credit clause of the Constitution requires that a statute of Iowa and decrees of an Iowa court rendered pursuant thereto, directing equable distribution of the assets of a dissolved insolvent Iowa corporation among its creditors, shall be given effect in Montana, in order to prevent the creation of preferences after dissolution in favor of certain creditors, resulting in unequal distribution.

Under Section 8964 of the Iowa Code, 1927, and Chapter 233 of the Acts of the Forty-third General Assembly of that State (R. 42-43), the title to the property of the Federal Surety Company located in Montana passed to the petitioner, E. W. Clark, Commissioner of Insurance of the State of Iowa, as charter liquidator, upon dissolution of that Company. That is settled by *Clark* v. *Williard,* 292 U. S. 112, 122, where it is stated:

> "The case should go back to the end that the priority of the execution may be determined with understanding of the *title* displaced and overridden."

It was further stated (292 U. S. 129):

> "To resume: The Supreme Court of Montana will determine whether there is any local policy whereby an insolvent foreign corporation in the hands of a *liquidator with title* must submit to the sacrifice of its assets or to their unequal distribution by writs of execution."

Under Section 8964 of the Iowa Code, equality of distribution among creditors, in effect, is prescribed by the provision that the court "shall decree a dissolution of said company, and a distribution of its effects, and appoint a receiver therefor." (R. 43)

That equality of distribution among creditors is prescribed by the Iowa statute appears from the decrees entered by the Iowa court on September 25, 1931, and December 22, 1931 (R. 45-54). By the first mentioned decree the Company was dissolved and its effects ordered to be distributed. Clark, as Commissioner of Insurance, was appointed permanent Receiver. He was directed to wind up the business of the Company. Creditors were ordered to file proofs of claim within a limited time, in default of which they were barred from participation in distribution. The Receiver was directed to sell the property of the Company, subject to the approval of the court. The court retained jurisdiction for the purpose of entering further orders or decrees necessary or proper (R. 46-49). By the second decree the court found that the Company had been dissolved on September 25, 1931, its corporate existence was then terminated; that the Receiver was the successor to the Company, and as such held title to all property owned by it at the time it ceased to exist, and that in passing upon the validity of claims presented, judgments purporting to have been rendered after September 25, 1931, should

be disregarded, and any lien asserted by virtue of attachment or other proceedings in any case where judgment was not rendered prior to September 25, 1931, should be disregarded in determining the rights of claimants (R. 53-54). There is an inescapable conflict between the last mentioned provision of that decree and the Montana judgment under review.

It is submitted that upon the entry of the Iowa decree of September 25, 1931, dissolving the Company, appointing Clark as receiver thereof, with title to all its assets, he became a statutory trustee for the benefit of creditors (*Relfe* v. *Rundle,* 103 U. S. 222, 226), and their interests as beneficiaries of the trust could no more be changed by action taken by one or more of them thereafter, than if the trust had been created by agreement among the interested parties. In the absence of direction in the statute to the contrary, the trust upon which Clark held the title to the assets of the Company was one for distribution thereof, first, among its creditors, and second, among its stockholders, *in accordance with their respective rights as they then stood.* This was the construction which was given to the statute by the Iowa decree of December 22, 1931.

The decision of the Montana court purports to recognize the title of the charter liquidator, but it refuses to give effect to the statute and the decrees of the Iowa court construing it and putting it into operation, in so far as equality of distribution among creditors and prevention of creation of subsequent preferences are provided for.

Does such refusal constitute a denial of full faith and credit to the Iowa statute or to the Iowa decrees, which is prohibited by Section 1 of Article IV of the Constitution? The answer to this question depends upon the jurisdiction of the Iowa legislature to make the foregoing provisions in the charter of an Iowa corporation and to give

them binding effect and operation upon all who deal with the corporation.

The legislative power of the State which creates a corporation may provide for its dissolution and for the succession of a liquidator with title to its assets, to make distribution of the corporate assets among creditors. Such a provision is binding upon all creditors, no matter where residing, and is entitled to full faith and credit in another State. (*Relfe* v. *Rundle,* 103 U. S. 222, 226; *Clark* v. *Williard,* 292 U. S. 112.)

The rule stated in *Relfe* v. *Rundle,* 103 U. S. 222, 226, is particularly applicable. Every person who deals with a corporation "everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs, both in life and after dissolution," and all who are interested in its affairs can insist that such charter provisions shall be regarded.

On the same principle, the legislature of the incorporating State has jurisdiction effectively to provide for equality of distribution among the creditors of the corporation.

Wherever a corporation goes for business, it carries its charter with it, as that is the law of its existence, and the charter is the same abroad as it is at home. While a corporation of one State may be excluded from business in another, or restricted in the exercise of some of its powers, it must, if admitted, in the absence of legislation equivalent to making it a corporation of the latter State, be taken, both by the latter State and those who deal with it, as a creature of the State of its creation. (*Canada Southern R. R. Co.* v. *Gebhard,* 109 U. S. 527, 537; *Relfe* v. *Rundle,* 103 U. S. 222, 226; *Bockover* v. *Life Association,* 77 Va. 85, 90; *McClement* v. *Supreme Court, I. O. F.,* 222 N. Y 470; 119 N. E. 99, 101.)

Montana might have excluded Federal Surety Company from doing business in Montana for any cause, including dissatisfaction with the terms of its charter providing for the method of its dissolution and the distribution of its assets in case of insolvency. But if Montana admitted the corporation to do business in Montana, *it did so subject to the provisions of its Iowa charter* regarding equality of distribution among its creditors, and to all legislative control "that may be properly exercised over it at the place of its creation." (*Canada Southern R. R. Co.* v. *Gebhard,* 109 U. S. 527, 537; *Relfe* v. *Rundle,* 103 U. S. 222, 226.)

In *Canada Southern R. R. Co.* v. *Gebhard,* 109 U. S. 527, 537, the question involved was whether legislation of the Parliament of the Dominion of Canada passed after the execution by a railroad company of its bonds, by which it was provided that all bondholders should be deemed to have assented to a re-arrangement of the corporate indebtedness of the railroad company, under which the indebtedness and the interest rate were reduced, was binding upon bondholders resident in New York, who sued in a Federal Court in New York upon the bonds. In Canada, the legislation was valid and binding. This Court held that "things done in one country under the authority of law may be of binding effect in another country", and announced the principle that the corporate charter abroad is the same as at home, and decided that one who deals with a foreign corporation "impliedly subjects himself to such laws of the foreign government, affecting powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes." "He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view

to any other laws with which they are not in entire harmony." While no question regarding the full faith and credit clause was there involved, the opinion establishes the competency of the legislature of the incorporating country by apt charter provisions to prescribe the effect of obligations entered into by the corporation, and holds that all who deal with the corporation are bound by such legislation.

Bradford Electric Light Company v. *Clapper,* 286 U. S. 145, is a decision which we regard as particularly important. It was there decided that a statute is a public act within the meaning of Section 1 of Article IV of the Constitution. There an action was brought in a New Hampshire court under the Workmen's Compensation Act of that State. The defendant was a Vermont corporation. The employee, whose death was caused in consequence of an accident arising in the course of his employment, was a resident of Vermont and was employed by the corporation in Vermont, but for service in either State. Vermont had a compensation law differing in many respects from that of New Hampshire. Death of the employee occurred as a result of an accident in New Hampshire, while the employee was a resident of Vermont. The Company relied upon the Vermont compensation law as a defense. The question was whether the Vermont law became a part of the contract governing the relations, rights and liabilities of the employer and the employee, even though the injury occurred without the State, while the employee was temporarily employed without the State, and whether, if such were the case, full faith and credit had to be given by the New Hampshire courts to the Vermont compensation law, and that law be given effect as a defense by the Company in the New Hampshire courts.

It was contended, in opposing the application of the full faith and credit clause, that the Vermont statute would

thereby be given extra-territorial effect. The Court held that the rights created by the Vermont Act were entitled to protection when set up in New Hampshire by way of defense to the action there brought. (286 U. S. 159.)

It is submitted that that opinion is applicable here. Here, the petitioner relies upon the full faith and credit clause as a defense against the motion of the respondents to vacate the order of the District Court of Cascade County, Montana, which confirmed the title of petitioner and denied the validity of the execution levies of the respondents (R. 87). In asserting this defense, petitioner is acting on behalf of all creditors of the Surety Company. It is his duty to protect their interests. He seeks by that defense to have the provisions of the Iowa charter and the Iowa decrees given effect, against the attempt to create a preference by action taken subsequent to dissolution, contrary to the Iowa statute and the Iowa decrees.

In *Royal Arcanum* v. *Green,* 237 U. S. 531, there was involved the question as to whether the New York courts were bound, under the full faith and credit clause, to give effect to a Massachusetts statute under which a fraternal benefit society was incorporated with regard to its powers to increase rates, and to a judgment of a Massachusetts court upholding the validity of an increase in rates made under the authority of the statute. The Court referred to *Head* v. *Providence Ins. Co.,* 2 Cranch 127, holding that a corporation derives all its powers from the act of its incorporation and to the line of cases of which *Converse* v. *Hamilton,* 224 U. S. 243 (hereinafter referred to) was one, and decided that applying the full faith and credit clause to the case was but another application of the principles established by those cases. It was held that the Massachusetts statute was controlling, and by disregarding it the New York courts failed to give effect to the full faith and credit clause.

That case was followed in *Modern Woodmen of America* v. *Mixer*, 267 U. S. 544, 551, where the Court said:

> "We need not consider what other states may refuse to do, but we deem it established that they cannot attach to membership rights against the company that are refused by the law of the domicil."

If a member of a fraternal benefit society, regardless of his residence, is bound by legislative provisions of the incorporating State, which constitute a part of the charter, and by judgments of its courts construing the statutes and giving them effect, notwithstanding that they conflict with the law of the forum and of the residence of the member, the same principle should be applied to one who becomes a creditor of a corporation.

The power to contract, under which the obligation is created, is conferred by the incorporating law. (*McClement* v. *Supreme Court I. O. F.*, 222 N. Y. 470, 119 N. E. 99, 101.) A creditor, taking advantage of the power to contract thus accorded, acquires whatever rights he possesses, subject to the conditions annexed by the incorporating law, just as a member of a fraternal benefit society accepts the benefits of membership subject to such conditions and liabilities as membership imposes under the incorporating law.

As in *Royal Arcanum* v. *Green*, 237 U. S. 531, 540, 541, it does not seem to be material in this case to attempt to make a distinction between the Iowa statute and the Iowa decrees relied upon by the petitioner. The statute relied upon, properly construed, and the Iowa decrees provide for the same thing, viz., equality of distribution among creditors. Application of the full faith and credit clause to either the statute or the decrees will produce the same result.

II.

Montana local policy cannot control the Iowa statute or decrees providing for equable distribution. Any such policy must yield to the full faith and credit clause when asserted as a defense against a creditor's attempt to obtain a preference contrary to the Iowa statute and decrees.

Of what importance is the determination by the Montana court that the policy of that State permits an execution levy to override the title of a charter liquidator of a foreign corporation?

In the absence of constitutional mandate, each State would have the right to determine for itself to what extent it would give effect, in litigation in its courts, to the statutes of a sister State or the judgments of the courts thereof.

Under the doctrine of comity, in the absence of a local policy to the contrary, recognition and enforcement of rights claimed or defenses urged under applicable statutes or court proceedings of other states ordinarily would be given.

The full faith and credit clause substitutes for the rule of comity *constitutional obligation* with respect to the acts and judicial proceedings of a sister State in matters over which it has jurisdiction. That clause at least requires the courts of the forum to recognize a defense founded upon an applicable statute or court proceeding of a sister State on a matter within its jurisdiction, notwithstanding such recognition is contrary to local policy.

In *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 160, already referred to, it was contended that the full faith and credit clause did not require New Hampshire to give

effect to a statute of another State obnoxious to its public policy. The Court stated that while the full faith and credit clause does not require enforcement of every right conferred by a statute of another state, and a plaintiff may be denied relief "because the enforcement of the right conferred would be obnoxious to the public policy of the forum," where the party claiming the benefit of the full faith and credit clause is asserting a defense "different considerations apply." It was there said (286 U. S. 160):

> "A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done."

Here, to refuse to give effect to the Iowa statute and the decrees rendered pursuant thereto, which were relied upon by the petitioner as a defense to respondents' motion to vacate the order of the District Court of Cascade County and to give preference to their execution levy, will subject all other creditors of the Surety Company to the irremediable loss of the assets levied upon under the execution and render certain the payment of a lesser dividend to them than they would otherwise receive.

As the Iowa legislature had jurisdiction to provide for equality of distribution among the creditors of a corporation which it created, in the event of its dissolution, that matter is a question with respect to which "no other State properly can be said to have any public policy." (*Converse* v. *Hamilton*, 224 U. S. 243, 260.)

Converse v. *Hamilton* would seem to be decisive. There a receiver appointed under the provisions of a Minnesota

statute (who was a quasi-assignee of a cause of action in favor of creditors of an insolvent corporation against its stockholders) sought in a Wisconsin court to recover from a Wisconsin stockholder the liability imposed by the Minnesota statute upon the stockholders of a Minnesota corporation. The defense was made that the enforcement of such a liability was contrary to the public policy of Wisconsin. The full faith and credit clause of the Constitution was relied upon to reverse the judgment of the Wisconsin court upholding the defense. It appeared that proceedings had been had in Minnesota under the Minnesota statute to establish the liability, but the stockholder sued had not been served with process therein. The decision of this Court required that the public policy of Wisconsin on the subject of enforcing such stockholders' liability yield to the full faith and credit clause.

Here a similar contention is made, viz., that the policy of Montana permits an execution levy upon the assets of a dissolved insolvent Iowa corporation to take precedence over the title of a charter liquidator, notwithstanding the statutes and judicial proceedings in Iowa requiring equable distribution. As the public policy of Wisconsin was required to yield to the full faith and credit clause in *Converse* v. *Hamilton*, it would seem that Montana's public policy on the question here involved must yield to that clause.

No State policy on any question has ever been permitted to transcend the Federal Constitution. By its terms, it is the supreme law of the land in so far as the subject comes within its scope. If the full faith and credit clause of the Constitution applies to the Iowa statute or the Iowa decrees, the mandate of the Constitution cannot be overcome by a contrary declaration of local policy. That was precisely what the Constitution was designed to prevent.

It was held in *Christmas* v. *Russell,* 5 Wall. 290, 302, and repeated in *Roche* v. *McDonald,* 275 U. S. 449, 452, that a judgment of a sister State, if valid where rendered, must be enforced in another State, although repugnant to its own statutes or policy. These cases, and the authorities cited in them, establish the proposition that where the full faith and credit clause and the local policy of the State of the forum come in conflict, the latter must yield to the former, subject possibly to the exception noted in the cases cited in the *Clapper* case, 286 U. S. 145, 159, 160, regarding the circumstances under which a State may decline to enforce a foreign cause of action, leaving it otherwise unaffected.

The Montana court regards the question here involved as one of comity. We submit it to be a question of constitutional obligation. Whether the question is one of comity or constitutional obligation depends upon the jurisdiction of the Iowa legislature to deal with the question of equable distribution. If it had such jurisdiction, its statutes and judicial proceedings thereunder are entitled to full faith and credit, which cannot be avoided by a contrary local policy.

III.

Iowa alone possesses jurisdiction to determine the rules by which intangible property of one of its dissolved corporations shall be held, transferred and distributed among that corporation's creditors.

It is not very clear from the record just what is the nature of the property involved in this controversy. The original complaint averred that the Surety Company had "cash money" in the amount of $25,000.00 in the hands of the Industrial Accident Insurance Commission of Montana, and that the Company had a $15,000.00 judgment recovered

in Montana against another corporation, $10,000.00 in custodia legis in Montana and $3,500.00 in cash in the hands of its trustees in Montana. (R. 29.) The answer admitted these allegations, except it averred that only $19,200.00 was in the hands of the Industrial Accident Insurance Commission, and only $8,500.00 in the custody of the law. (R. 40.) The affidavit filed in support of the respondents' motion to vacate states that the execution of respondents was levied "upon certain property and bonds" of the Company in the hands of the Commissioner of Agriculture of Montana, amounting to $19,000.00, and upon $8,500.00 "of funds" in the hands of the clerk of one of the Montana courts, belonging to the Company, its officers or agents, in trust therefor. (R. 70.) The execution is in the record (R. 86) but not the levy thereof.

To the extent that any of the property levied upon consisted of bonds, stocks, bank deposits, credits or accounts, it was clearly intangible property under the decisions of this Court. Cash, however, has been held to be a tangible. (*Blodgett* v. *Silberman,* 277 U. S. 1, 18.)

Late cases decided by this Court, of which *Farmers Loan & Trust Company* v. *Minnesota,* 280 U. S. 204, 209; *Baldwin* v. *Missouri,* 281 U. S. 586, 593, and *First National Bank* v. *Maine,* 284 U. S. 312, 326, are the leading cases, lay down the proposition that two States do not have jurisdiction to levy inheritance taxes upon the same intangible property; —that only the State of domicil of the owner has such jurisdiction. The inheritance taxes there in question were succession taxes, the validity of which, under the Constitution, is based upon the power of the State to control the right of succession to property passing from the dead to the living and to prescribe the terms upon which it passes.

If, in the case of an individual, a transfer from the dead to the living can be accomplished only at one place, and in

the case of intangibles, only at the domicil of the deceased owner, does not the same rule apply where a corporation is dissolved and the statutes of the State of its domicil, forming a part of its charter, provide that the title to its property shall be transferred to a liquidator for equable distribution among its creditors?

If Montana would have no right to levy a succession tax upon the property here involved or prescribe the terms of its succession, had it been individually owned and its owner had died, can it be said to have the power to determine property rights therein contrary to the Iowa statute by which it was held by its dissolved owner, because the controversy with regard thereto happens to get into the Montana courts? If the property levied upon here had situs in Iowa for the purposes of taxation and succession, must not the rules regulating its transfer, disposition and distribution among the corporation's creditors be those prescribed by the Iowa law? Must not a valid transfer in Iowa be given effect in Montana, and must not that transfer have the same effect in Montana that it has in Iowa?

If the property involved is intangible property, over which Iowa had jurisdiction because it was held and owned by an Iowa corporation, a failure to give effect to the Iowa statute regulating the passage of title thereto upon dissolution and prescribing the nature of the beneficial interests of its creditors therein, and to the Iowa decrees based upon the Iowa statute, is a denial of full faith and credit to the Iowa statute and decrees.

There is nothing in the record showing the circumstances under which the property levied upon came into Montana, which might be made the basis of a conclusion that the property had obtained a business situs in Montana because of its being an integral part of a local business there trans-

acted by the Surety Company. (See *First National Bank* v. *Maine*, 284 U. S. 312, 320, and *Farmers Loan & Trust Company* v. *Minnesota*, 280 U. S. 204, 208.)

IV.

Comments upon certain contentions relied upon by respondents or the Montana Supreme Court.

(a) Respondents' contention that full faith and credit need not be given to the legislation or judgments of other states regarding title to real estate not located therein.

The question involved does not concern title to real estate located in another State. It is not controverted, and, indeed, it cannot be, that a State by appropriate legislation, may endow a corporation of its creation with such powers and impose upon it such duties as it may prescribe, and may provide as a part of the incorporating act the rights which its creditors will have in its assets in case of its insolvency. Such provisions are part of the law of its creation. They go with it into every State where it may transact business. Such provisions are within the jurisdiction of the incorporating State. They are binding upon its creditors, regardless of their residences. They may be insisted upon, as was said in the *Relfe* case, (103 U. S. 226) by anyone who is "interested in the affairs of the corporation." They create a defense against an attempt of any creditor to obtain, whether under the laws of another State or otherwise, a preference which the incorporating statute denies.

Such legislation, and court decrees entered in a proceeding against the corporation instituted in conformity therewith, giving it effect, differ materially from legislation or court decisions of one State attempting to exercise

jurisdiction over real estate located in another State. Although title to real estate is not here involved, if it were, the question of title would only be an incident of the broader question of the jurisdiction of the Iowa legislature by appropriate provision to direct equable distribution among the creditors of one of its corporations upon dissolution.

We submit that the legislation here in question was within the jurisdiction of the Iowa legislature, and it and the decrees entered pursuant thereto, are entitled to the protection of the full faith and credit clause. The Act of Congress passed under that clause of the Constitution (Sec. 687, Title 28, U. S. C. A.), requires the decrees to be given the same effect in Montana as they have in Iowa. Their effect in Iowa is shown by the Iowa decree of December 22, 1931 (R. 50). The Montana judgment under review is in direct conflict therewith.

(b) The Montana court's decision that Montana has control over rights of property located therein and remedies in regard thereto.

The opinion of the Montana court states: "Rights and remedies of property are governed by the laws of the state in which it is situate" (R. 11). Its view apparently was that Montana's control over property within its boundaries is sovereign and unimpaired by the Federal Constitution. But Montana cannot withhold full faith and credit under the guise of property regulation. Full faith and credit requires in this case equable distribution. If Montana brings about other than equable distribution, it has failed to give full faith and credit, and its ground or reason for so doing is immaterial.

A statute of Mississippi, under the guise of attempting to give effect to its statutes of limitation, sought to control the enforcement in its courts of judgments obtained in other States. The statute was declared unconstitutional because it conflicted with the full faith and credit clause. (*Christmas* v. *Russell*, 5 Wall. 290, 301.) Here Montana under the guise of its right to regulate property and remedies in Montana attempts to control the enforcement of the Iowa statutes and Iowa decrees in regard to matters over which Iowa, and Iowa alone, had jurisdiction.

On respondents' theory it might be urged with equal force that Montana could refuse to give full faith and credit to a personal judgment of a court of a sister State in a cause in which it had jurisdiction, because the effect of so doing eventually would be a judgment against the defendant, under which his Montana property might be taken in execution, and thus the control of Montana over the property located within its boundaries be interfered with.

(c) The contention that Chapter 233 of the Iowa statutes restricting the Court's choice in selection of a receiver was passed subsequently to the execution of the attachment bond and therefore should not be regarded.

A question is raised that Chapter 233 of the Acts of the Forty-third General Assembly was passed by the Iowa legislature after the execution of the attachment bond to the respondents. Chapter 233 is copied in the Record at page 43. That is not the statute which provides for equality of distribution among creditors; that was done by Section 8964 of the Iowa Code of 1927, being Section 1731 of the Code of 1897 (R. 51). Chapter 233 merely restricts the court in the selection of a person to be appointed receiver or liquidating officer, and in the compensation which should

be paid to him. But even if Section 8964 (which is the governing statute on the question of equality of distribution among creditors) had been passed subsequently to the execution of the bond in question, it would have been a valid exercise of power on the part of the Iowa legislature. It impaired no contract obligation. This question was fully considered in the *Bockover* case, 77 Va. 85, 88, where the statute was passed after the insurance contract was made. The Court said (p. 89):

> "A statute, whose whole object is to provide a convenient and judicious mode for winding up an insolvent corporation and distributing its assets equitably amongst those entitled thereto, surely violates no contract" * * *

The statute there in question was the same one which was considered in the case of *Relfe* v. *Rundle,* 103 U. S. 222, 226. See also *Swan* v. *Mutual Reserve Fund,* 155 N. Y. 9, 21, 22.

(d) The contention that respondents did not deal voluntarily with the Federal Surety Company.

It is also contended by respondents that they did not voluntarily deal with the Federal Surety Company, and, therefore, cannot be deemed to have assented to any of its charter provisions. Whether they dealt voluntarily or not is unimportant. What security should be required to be given by the plaintiff in an attachment suit instituted in Montana was a matter for the Montana legislature to decide. Montana might have decided that corporations whose charter provisions were similar to those of the Federal Surety Company should not be accepted as sureties upon attachment bonds. But when Montana authorized Federal Surety Company to do business in that State and to become surety on such bonds, it must

be deemed to have done so with full knowledge of the provisions of its charter. As Montana might have permitted the attachment without security, respondents can have no complaint. Montana, in a sense, was the one to whom the bond was given, although it was made for respondents' benefit. The requirement of the bond and its terms were prescribed by Montana. It was Montana which permitted the attachment and prescribed the conditions. Respondents cannot take advantage of the bond and deny Montana's right to act for them in exacting it. When Montana permitted Federal Surety Company to become surety on an attachment bond, it conferred upon that corporation no power which its charter did not give it. That respondents did not consent to the attachment against their property and to the bond given as security cannot operate to make that bond a different obligation of the Surety Company than if they had consented. Montana had no right to impose upon the Company a liability contrary to its charter granted by Iowa, though it had the right to exclude it from doing business generally, or to prohibit it from writing attachment bonds.

(e) The contention that because the property in the hands of the Surety Company was subject to execution levy, it is likewise so subject in the Receiver's hands.

Respondents claim that Clark, as receiver, can have no more power than the Surety Company had, and as the Company's property was subject to execution in its hands, the receiver's title to the property is likewise subject to execution issued against the Company. This argument can have no weight if the construction of the Iowa charter which we have contended for is a correct one, and if it is entitled to full faith and credit in Montana. Equable distribution is a right of all creditors. Clark, as receiver, represents them. He is their trustee. If that is a correct construction of the Iowa charter and it is entitled to faith

and credit, it necessarily follows that a decision giving one creditor a preference over other creditors denies that charter faith and credit.

CONCLUSION.

In conclusion, it is submitted that the Iowa legislature was dealing with a subject wholly within its jurisdiction in determining the method of distribution of the assets of one of its corporations among its creditors upon its dissolution. That was a question which was within its jurisdiction and not within the jurisdiction of any other State. Its legislation, and the decrees of its courts construing it and giving it effect, are entitled to full faith and credit. There is no conflict of sovereign powers, because no sovereignty other than Iowa had jurisdiction with regard to the real issue here involved. So far as the property levied upon was intangible property, Iowa, and Iowa alone, could control the transfer of its title and its distribution among creditors.

The attempt of Montana to permit other than equable distribution among creditors is a denial of full faith and credit to the Iowa statute and decrees. Its reasons are immaterial. Its local policy cannot control the Constitution,—to it they must yield.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 361.—October Term, 1934.

E. W. Clark, Commissioner of Insurance of the State of Iowa, as Receiver of Federal Surety Company, Petitioner,
vs.
Harry O. Williard, W. W. Wheaton, and C. W. Hay, as Trustees of Gordon Campbell-Kevin Syndicate, et al., Respondents.

On Writ of Certiorari to the Supreme Court of the State of Montana.

[February 4, 1935.]

Mr. Justice Cardozo delivered the opinion of the Court.

What is before us is another chapter of a controversy that was here at the last term. *Clark* v. *Williard*, 292 U. S. 112.

The controversy is the outcome of conflicting claims to the Montana assets of an Iowa corporation. On the one side is the petitioner, the Insurance Commissioner of Iowa, claiming as official liquidator. On the other side are the respondents, judgment creditors of the corporation, armed with an execution which they insist upon the right to levy. If the petitioner prevails, there is equal distribution; if the respondents prevail, the race is to the swift.

When the case was here before, the Supreme Court of Montana had given priority to the judgment creditors, placing its ruling upon the ground that the petitioner, the foreign liquidator, was not a successor to the corporation, but a chancery receiver, with a title, if any, created by the Iowa decree. 94 Mont. 508; 23 Pac. (2d) 959. We held that under the statutes of Iowa the liquidator was the successor to the corporation, and not a mere custodian, and that in ruling to the contrary the Supreme Court of Montana had denied full faith and credit to the statutes of a sister state. 292 U. S. 112, 121. The question was then an open one whether there

was any local policy, expressed in statute or decision, whereby the title of a statutory successor was to be subordinated to later executions at the suit of local creditors. As to that question the Supreme Court of Montana would speak the final word. 292 U. S. 112, 123. The decree was accordingly vacated and the cause remitted to the state court to the end that the local policy might be made known through the one voice that could declare it with ultimate authority.

The Supreme Court of Montana has reconsidered the conflicting claims of liquidator and creditors in the light of that decision. It has held (the Chief Justice and an Associate Justice dissenting) that the local policy of the state permits attachments and executions against insolvent corporations, foreign and domestic; that the writs will not be halted though the effect of the levy may be waste or inequality; and that this rule will prevail against a statutory successor, clothed with title to the assets, just as much as against the corporation itself or the trustees upon dissolution or a chancery receiver. *Mieyr* v. *Federal Surety Co.*, 34 Pac. (2d) 982. A writ of certiorari brings the case to us again.

Every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under the process of its courts. *Green* v. *Van Buskirk*, 5 Wall. 307, 312; 7 Wall. 139; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664, 671; *Security Trust Co.* v. *Dodd, Mead & Co.*, 173 U. S. 624, 628. Montana does not challenge the standing of this foreign liquidator as successor to the dissolved corporation or as owner of its assets. On the contrary his standing and ownership are now explicitly conceded. All that Montana does by the decree under review is to impose upon such ownership the lien of judgments and executions in conformity with local law. In this there is no denial to the statutes of Iowa or to its judicial proceedings of the faith and credit owing to them under the Constitution of the United States. United States Constitution, Article IV, § 1.

If the corporation were still in being, and still the owner of the assets, its ownership would be subordinate to the process of the local courts. So much would be conceded everywhere. If title had been conveyed to an assignee for the benefit of creditors by a common law assignment or by insolvency proceedings, claimants in Montana might pursue their suits and remedies in derogation of

the assignment when the law or policy of the locality ordained that this result should follow. So much, again, is settled by unimpeachable authority. *Security Trust Co.* v. *Dodd, Mead & Co., supra; Disconto Gesellschaft* v. *Umbreit,* 208 U. S. 570, 579, 580; *Cole* v. *Cunningham,* 133 U. S. 107; *Oakey* v. *Bennett,* 11 How. 33, 44; *Ockerman* v. *Cross,* 54 N. Y. 29; *Warner* v. *Jaffray,* 96 N. Y. 248, 255; *Barth* v. *Backus,* 140 N. Y. 230; *Ward* v. *Conn. Pipe Mfg. Co.,* 71 Conn. 345; *Gilbert* v. *Hewetson,* 79 Minn. 326. The principle of these decisions applies with undiminished force to a statutory successor. In respect of his subjection to the power of the local law, his position is no better than that of the dissolved corporation to whose title he has succeeded or of its voluntary assignee upon a trust for all the creditors. He must submit, as must they, to the mandate of the sovereignty that has the physical control of what he would reduce to his possession. Cf. *Disconto Gesellschaft* v. *Umbreit, supra; City Bank Farmers Trust Co.* v. *Schnader,* 293 U. S. 112; *Cooper* v. *Philadelphia Worsted Co.,* 68 N. J. Eq. 622, at p. 629.

This is not to say that any uniform policy prevails among the states when liquidators and creditors thus compete with one another. The diversity of practice was pointed out, with citation of the precedents, when the case was here before. 292 U. S. 112, at p. 122. Some states prefer a rule of equal distribution and compel the local suitor to yield to the statutory successor (*Martyne* v. *American Union Fire Ins. Co.,* 216 N. Y. 183), though at times with precautionary conditions. 292 U. S. 112, at p. 129; *People* v. *Granite State Provident Association,* 161 N. Y. 492. Other states give the local creditor a free hand, with the result that he may seize what he can find, though the assets of the debtor are dismembered in the process. *Lackmann* v. *Supreme Council,* 142 Cal. 22; *Schloss* v. *Surety Co.,* 149 Ia. 382; *Zacher* v. *Fidelity Trust Co.,* 109 Ky. 441. Choice is uncontrolled, as between one policy and the other, so far as the Constitution of the nation has any voice upon the subject. Iowa may say that one who is a liquidator with title, appointed by her statutes, shall be so recognized in Montana with whatever rights and privileges accompany such recognition according to Montana law. For failure to give adherence to that principle we reversed and remanded when the case was last before us. Iowa may not say, however, that a liquidator

with title who goes into Montana may set at naught Montana law as to the distribution of Montana assets, and carry over into another state the rule of distribution prescribed by the statutes of the domicile.

Converse v. *Hamilton,* 224 U. S. 243, holds nothing to the contrary. A statutory liquidator of a Minnesota corporation brought suit in Wisconsin against defendants there residing to enforce their personal liability as stockholders in accordance with a Minnesota statute. The only question was whether the liquidator so appointed had capacity to sue. In the view of the court capacity and title were established by the laws of Minnesota. United States Constitution, Article IV, § 1. The ruling did not affect the power of Wisconsin to subject the proceeds of the cause of action or any other assets to the claims of local creditors. Nothing in the case suggests that creditors of the Minnesota corporation were suing in Wisconsin or that there was threat of suit thereafter. The problem now here was left untouched and unconsidered.

The petitioner makes a point that the property or part of it subjected to the levy was not of such a nature as to have a situs in Montana or to be amenable to process issuing from her courts. No such point was made in the record of the proceedings in the court below. No such point was made in this court in the petition for certiorari to bring the case here for review. It will not be considered now. *Gunning* v. *Cooley,* 281 U. S. 90, 98; *Zellerbach Paper Co.* v. *Helvering,* 293 U. S. 172, 182; *Helvering* v. *Taylor,* January 7, 1935, — U. S. —.

The decree should be affirmed, and it is

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.